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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1954

No. 44

LATHAM CASTLE, ATTORNEY GENERAL OF THE STATE OF ILLINOIS, ET AL., PETITIONERS,

vs.

HAYES FREIGHT LINES, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

PETITION FOR CERTIORARI FILED APRIL 16, 1954
CERTIORARI GRANTED JUNE 7, 1954

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 697

LATHAM CASTLE, ATTORNEY GENERAL OF THE STATE OF ILLINOIS, ET AL., PETITIONERS,

vs.

HAYES FREIGHT LINES, INC.

No. 706

HAYES FREIGHT LINES, INC., APPELLANT,
LATHAM CASTLE, ATTORNEY GENERAL OF THE

vs.

STATE OF ILLINOIS, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO AND ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

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IN THE SUPREME COURT OF ILLINOIS, MAY TERM, A. D. 1953

HAYS FREIGHT LINES, INC., Plaintiff-Appellant,

vs.

LATHAM CASTLE, Attorney General of the State of Illinois, and Basil Wilson, States Attorney of Marion County, Illinois, Defendants-Appellees.

Appeal from Circuit Court, Marion County.

Honorable Ward P. Holt, Trial Judge.

Abstract of Record

IN CIRCUIT COURT OF MARION COUNTY

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTION—Filed March 24, 1953

Now comes plaintiff Hayes Freight Lines, Inc. by Axelrod, Goodman & Steiner and Miller and Pfaff, its attorneys and respectfully states to the Court as follows:

1. This is a proceeding for declaratory relief under Chapter 110, Section 181.1, Illinois Revised Statutes for the purpose of determining a question in actual controversy between the parties hereto.

[fol. 7] 2. Plaintiff is an Illinois corporation organized and existing under the laws of the State of Illinois, on January 9, 1911, as successor in interest to the trucking business originally commenced by Iddo S. Hayes, in Mattoon, Illinois in 1887 and engages in the transportation of property by motor vehicle, as a common carrier, both in interstate commerce between points in various States as hereinafter set forth, and in intrastate commerce within several States, including the State of Illinois.

3. The State of Illinois has enacted legislation which is found in Chapter 95½, Section 228, Illinois Revised Statutes

which fixed a limitation upon the weight of trucks, trailers or other vehicles for the carriage of property upon the highways of the State of Illinois.

4. Chapter 95½, Section 229b, Illinois Revised Statutes, passed by the Legislature of the State of Illinois on July 11, 1951, provides, among other things:

(c) It shall be the duty of each state highway policeman arresting any person for having operated a vehicle in violation of the provisions of Section 131 of this Act (Chapter 95½, Section 228, Illinois Revised Statutes) to ascertain the make, motor number, serial number and registration and any other identification number of the vehicle having been operated in violation of said section and if the person so arrested was operating as the agent, servant or employee of any person, firm or corporation, the name and address of such person, firm or corporation. Upon the conviction of any person for having operated a vehicle in violation of the provisions of Section 131 of this Act, such policeman shall report, in writing, to the Director of the Department of Public Safety (1) the date of the offense, (2) the name and residence of the driver, (3) the county in which the offense was committed, (4) the court and date of the conviction, (5) [fol. 8] the amount of the fine imposed, (6) the make, motor number, serial number and registration and any other identification number of the vehicle so operated in violation of law and (7) if the person so convicted was the agent, servant or employee of another person, firm or corporation, the name and address of such other person, firm or corporation. The Director of the Department of Public Safety shall transcribe the same in the records of his office and shall send a copy of such written report by United States Mail to the person, firm or corporation in whose name the vehicle mentioned in such report is registered within five days after said name becomes known to the Director. The record of any such report so transcribed may be proved by a copy thereof certified under the hand of said Director. Any such certified copy shall be prima facie evidence of the facts therein set forth, transcribed from the report of the state highway policeman, as above provided.

(d) Whenever it shall come to the attention of the Director of the Department of Public Safety that a total of

ten convictions for violation of Section 131 of this Act have been entered during any twelve consecutive months period with respect to the operation of commercial vehicles operated by any one commercial vehicle operator, whether operated individually or through agents, servants or employees of such commercial vehicle operator, it shall be the duty of the Director of the Department of Public Safety to notify the Attorney General of such fact and it shall be the duty of the Attorney General to bring a proceeding in the name of the people of the State of Illinois to suspend the commercial vehicle operator's privilege of such commercial vehicle operator.

(e) Jurisdiction of such proceedings shall be in the Circuit Courts of the respective counties and the Superior Court of Cook County. The venue shall be in any county where any of the offenses referred to in Sub-section (c) of this section may have occurred or as provided in an Act of the General Assembly entitled, "An Act in Relation to [fol. 9] Practice and Procedure in the Courts of This State," approved June 23, 1933, as amended.

(g) The provisions of an Act of the General Assembly entitled, "An Act in Relation to Practice and Procedure in the Courts of This State" approved June 23, 1933, and all existing and future amendments of said Act and modifications thereof, and the rules now or hereafter adopted pursuant to said Act, shall apply to all proceedings hereunder, except as herein otherwise provided or except when inconsistent with the provisions of this Act.

Proof that a total of ten or more convictions for violations of Section 131 of this Act have been entered during any twelve months period with respect to the operation of one or more commercial vehicles by any one commercial vehicle operator, whether operated individually or through agents, servants or employees of such commercial vehicle operator, shall constitute prima facie evidence that such commercial vehicle operator has habitually operated a commercial vehicle or more than one commercial vehicle in violation of Section 131 of this Act. In any proceeding brought under this section, the court shall not find that a defendant has habitually operated one or more commercial vehicles in violation of Section 131 of this Act unless and until the court shall have considered the evidence to the contrary, if

any, offered by the defendant, and such evidence may include, but shall not be limited to, evidence relating to the character and gravity of such violations and the extent of the operations of commercial vehicles by or on behalf of such defendant upon the public highways of this state which did not involve any such violations.

(h) The papers, entries and records of the Secretary of State of this state, and of the officer of any other state in whose office any such commercial vehicle may be registered, showing the ownership of any such commercial vehicle, may be proved by a copy thereof, certified under the hand of the Secretary of State of this state, or of said officer of such other state. Any such certified copy, when admitted in [fol. 10] evidence, showing ownership of a commercial vehicle in a person of the same name as the defendant shall be prima facie evidence that the defendant is or was the owner of such commercial vehicle.

(i) Whenever the court shall find from the evidence that a commercial vehicle operator has habitually operated a commercial vehicle or more than one commercial vehicle in violation of Section 131 of this Act, it shall enter an order suspending the commercial vehicle operator's privilege of such commercial vehicle operator for a period of 90 days.

If at any time thereafter in another proceeding brought under this section, the court shall find from the evidence that a commercial vehicle operator has again habitually operated in violation of Section 131 of this Act, it shall enter a similar order of suspension except that the court shall suspend the commercial vehicle operator's privilege of such commercial vehicle operator for a period of one year.

5. In Case No. 52-13, pending in the Circuit Court of Marion County, Illinois, the People of the State of Illinois, *Ex Rel.* the Attorney General of the State of Illinois has filed a complaint against plaintiff herein alleging 157 violations of Chapter 95½, Section 228, Illinois Revised Statutes, 1951 to suspend for a period of 90 days, its commercial vehicle operator's privilege, pursuant to Chapter 95½, Section 229 (b), Illinois Revised Statutes, 1951.

Plaintiff herein has been informed, and on information and belief states the fact to be, that the State of Illinois, through its proper representatives (the Attorney General

of the State of Illinois and the States Attorney of Marion County, Illinois) is about to proceed to file another action alleging 144 additional violations of Chapter 95½, Section 228 against plaintiff in Marion County, Illinois pursuant to the aforesaid Section 229 (b), Chapter 95½, Illinois Revised Statutes seeking to suspend plaintiff's commercial vehicle [fol. 11] operator's privilege for a period of either 90 days or one year.

Plaintiff herein alleges that during the period of time covered by the complaint now pending in the Circuit Court of Marion County, Illinois, its vehicles operated approximately 60,000 vehicle trips over the highways of the State of Illinois; that during said same period, its vehicles traversed approximately 90,000,000 miles over the highways of the state of Illinois; that during said same period, it transported approximately 7,500,000 pounds of property daily over the highways of the State of Illinois; and that none of the 157 violations complained of, except 2, involves "gross" overloads (in that the maximum did not exceed 59,000 pounds as allowed under the provisions of Chapter 95½, Section 228, Illinois Revised Statutes 1951) as distinguished from "axle" overloads, resulting from the shift of cargo during the course of the operations of said motor vehicles.

6. In the conduct of its business as a common carrier, plaintiff operates 1929 motor vehicles; employs 2059 persons, of which 736 are utilized in its operation conducted within the State of Illinois in both inter- and intrastate commerce, and maintains terminals at Akron, Ohio, Cincinnati, Ohio, Cleveland, Ohio, Columbus, Ohio, Detroit, Michigan, Evansville, Indiana, Fort Wayne, Indiana, Hopkinsville, Kentucky, Indianapolis, Indiana, Lafayette, Indiana, Lexington, Kentucky, Louisville, Kentucky, Memphis, Tennessee, Milan, Tennessee, Muncie, Indiana, Nashville, Tennessee, Paducah, Kentucky, Pittsburgh, Pennsylvania, St. Louis, Missouri, Terre Haute, Indiana, Toledo, Ohio, Canton, Ohio, Hamilton, Ohio, Washington, Pennsylvania, Steubenville, [fol. 12] Ohio and Whiting, Indiana and Benton, Chicago, Danville, Joliet, Mattoon, Peoria, Quincy, Rock Island and Springfield, Illinois.

7. In the conduct of its business as a common carrier of property, transporting general commodities by motor

vehicle in interstate commerce, plaintiff conducts its operation under a certificate of public convenience and necessity issued to it by the Interstate Commerce Commission under Docket No. MC—42329. Said certificate authorizes and plaintiff conducts operations thereunder between various important and strategic points in the States of Illinois, Indiana, Iowa, Missouri, Kentucky, Tennessee, Ohio, Michigan, Pennsylvania and West Virginia. Plaintiff is also authorized to and transports property by motor vehicle in intrastate commerce within the State of Illinois as a line-haul carrier pursuant to a certificate of public convenience and necessity issued to it under L. H. 94, granted by the Department of Public Works and Buildings, Division of Motor Carriers. Said Certificates of public convenience and necessity issued to plaintiff by both the Interstate Commerce Commission and the Department of Public Works and Buildings, Division of Motor Carriers, cover operations conducted by plaintiff for a long period prior to the effective dates of the "grandfather" clauses of both the Interstate Commerce Act, enacted in 1935 and the Illinois Truck Act, enacted in 1939.

8. In the conduct of its business as a common carrier of property by motor vehicle, in both interstate and intrastate commerce, plaintiff serves approximately 1035 cities, villages and communities in the State of Illinois and 2500 cities, villages and communities in the other States in which it operates, some of which are solely dependent upon it for [fol. 13] their common motor carrier service. Among other things, plaintiff transports in interstate commerce, over the highways of the State of Illinois, dangerous explosives for the United States Government, covering movements under seal wherein the United States is both the shipper and consignee of the cargo involved, having handled a substantial amount of that kind of traffic, in furtherance of the defense effort. Among other things, plaintiff, under contract with the United States Post Office Department, operates over the highways of the State of Illinois in the performance of a postal service, handling United States mail over various routes between, among other places, Sparta, Illinois, and St. Louis, Missouri.

9. In the conduct of its business as a common motor carrier, plaintiff has certain fixed obligations with respect

to payments due on mortgages in the amount of $185,517.56 per annum, and rentals for terminals in the amount of $233,799.67 per annum, obligations covering payments for its motor vehicle equipment amounting to $1,088,722.10 per annum, tires and gasoline, amounting to $831,966.96 per annum and its payroll obligations to its employees, amount to $8,834,667.00 per annum. Its investment in terminal facilities and motor vehicle equipment used in the conduct of its operation in Illinois both in inter- and intrastate commerce, amounts to approximately $2,856,536.76 and its investment in terminal facilities and motor vehicle equipment used in the conduct of its operations in the other States in which it operates amounts to $2,757,034.15.

10. Plaintiff alleges and requests the Court to find that the provisions of Chapter 95½, Illinois Revised Statutes, Paragraph 229 (b) violate the Constitution of the State of Illinois and the Constitution of the United States of [fol. 14] America and are illegal, unconstitutional and void in the following respects, among others:

(a) Section 229 (b) deprives plaintiff of its property rights without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, which provides:

"* * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Section 229 (b) also deprives plaintiff of its property rights contrary to Article II, Section 2 of the Constitution of the State of Illinois, which provides:

"No person shall be deprived of life, liberty or property, without due process of law."

Said statute is unconstitutional in that it is vague, ambiguous and indefinite in that it does not set forth with sufficient certainty standards or guides by which the Court can determine that a commercial vehicle operator has habitually operated commercial vehicles in violation of

Section 131 of the Uniform Act Regulating Traffic on Highways, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States and Article II, Section II of the Constitution of the State of Illinois of 1870.

In addition thereto said Section is unconstitutional for the reason that the test set forth therein, namely, 10 convictions during any 12 consecutive months' period bears no reasonable relation to the number of vehicle trips, the miles traversed, or the cargo transported, and discriminates against those operators whose commercial vehicles may make many, frequent and continuous trips as distinguished from occasional and casual users of the public highways. [fol. 15] The imposition of the penalty provided for is unconstitutional for the reason that it provides for an arbitrary, discriminatory, unreasonable and oppressive test upon which to base a suspension of commercial vehicle operating rights and thus deprive plaintiff of its property without due process of law, and denies to it equal protection of the laws in contravention of the Fourteenth Amendment of the Constitution of the United States and Article II, Section II of the Constitution of the State of Illinois of 1870.

(b) Section 229 (b) violates Article II, Section II of the Constitution of the State of Illinois, 1870, which provides in part as follows:

"All penalties shall be proportioned to the nature of the offense. * * *"

Said Section 229 (b) is unconstitutional in that it provides for an unreasonable, oppressive, arbitrary and confiscatory penalty which is not proportioned to the alleged offense.

(c) Section 229 (b) constitutes an unreasonable and undue burden upon interstate commerce in violation of Article I, Section 8, of the Constitution of the United States, which grants to Congress the exclusive power to regulate commerce among the several states and which provides:

"The Congress shall have power * * * to regulate commerce among the several States * * *."

Only the Interstate Commerce Commission, pursuant to the provisions of Part II of the Interstate Commerce Act,

particularly under 49 U. S. C. A. Section 312 (a) has the power to suspend plaintiff's operations under the operating rights granted to plaintiff under Certificate of Public Convenience and Necessity No. MC-42329. Said Section 312 (a) [fol. 16] provides that certificates, permits and licenses shall be effective from the date specified therein and shall remain in effect until suspended or terminated as therein provided.

If plaintiff's commercial vehicle operating privilege should be suspended in this proceeding so that its vehicles could not traverse the highways of the State of Illinois, the service which defendant as a common carrier is required to provide and perform for the general public under its interstate operating rights would be terminated not only at points in the State of Illinois but also in fact in the various other cities and towns of the other States which plaintiff services in interstate commerce, as aforesaid.

Under the certificate granted to it by the Interstate Commerce Commission, said Commission has complete jurisdiction over its operations and plaintiff is obligated as a common carrier to render regular, continuous and adequate service to the general public as is required of it by 49 U. S. C. A. Section 304 (a) (1) wherein it is provided that:

"It shall be the duty of the Commission to regulate common carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service * * *."

(d) Said Section 229 (b) violates the Constitution of the State of Illinois of 1870, which provides in Article III thereof that:

"The powers of the government of this State are divided into three distinct departments—the legislative, executive and judicial; and no person, or collection of persons, being one of those departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted."

[fol. 17] The intrastate operating rights granted to plaintiff by the Department of Public Works and Buildings, Division of Motor Carriers of the State of Illinois were

granted to it pursuant to the provisions of The Illinois Truck Act. Said Act provides for proceedings to insure compliance with law including, among others, Chapter 95½, Section 228, Illinois Revised Statutes, 1951, and for the suspension, amendment and revocation of such operating rights (Chapter 95½, Sections 263, 277, Illinois Revised Statutes, 1951). Only the Department of Public Works and Buildings, Division of Motor Carriers which granted the rights in the first instance may suspend them or initiate suspension proceedings. In any event, suspension of such rights by a court would violate Article III of the Constitution of the State of Illinois of 1870.

11. The business conducted and operated by plaintiff as a common carrier of general commodities constitutes a very valuable property right and demands for its continuous existence that a regular and uninterrupted service be performed by it for the shipping and receiving public, both in the State of Illinois and in the various States in which it is authorized to operate and serve, in both interstate and intrastate commerce. If plaintiff's commercial vehicle operator's privilege were to be suspended for a period of either 90 days or one year, it may cause financial ruin and bankruptcy to plaintiff because of its inability to provide and render service over the highways of Illinois, in both interstate and intrastate commerce. Approximately 62½% of all of plaintiff's operations in interstate commerce, either originate at points in Illinois or are destined to points in Illinois, or must of necessity be handled in operations involving trips traversing the highways of the State of Illinois.

[fol. 18] If plaintiff were prohibited from operating over the Highways of the State of Illinois for either a period of 90 days or for one year, it would be compelled to release a very substantial number of its experienced and valuable personnel, a large number of whom have been continuously employed for many years, full well knowing that such employees would necessarily have to obtain gainful employment elsewhere, so that they would not return at a later date to plaintiff, or in the alternative, plaintiff would be compelled to pay such employees even though they were not working.

At the same time, plaintiff would be compelled to meet its various enumerated fixed financial obligations, as more particularly set forth hereinbefore, or, being in default, lose valuable properties and rights. Further, plaintiff's credit standing may be irreparably damaged, its assets would be dissipated, and, in addition, it would lose the valuable patronage of its customers acquired as a result of long and established service and good will, to its complete and irreparable damage.

12. Defendants, Latham Castle, Attorney General of the State of Illinois, and Basil Wilson, State's Attorney for Marion County, Illinois, and each of them, are charged separately, by law, with the duty of enforcing Chapter 95½ Section 229 (b) Illinois Revised Statutes, 1951, referred to herein, and unless each of them is separately restrained from bringing any proceeding to suspend plaintiff's commercial operator's privilege pursuant to said Section 229 (b) plaintiff will suffer irreparable damage.

13. In addition to the suit presently pending against plaintiff, there are presently pending approximately forty other complaints filed by the People of the State of Illinois in various Circuit Courts in the State of Illinois, against [fol. 19] other motor common carriers, under which the commercial vehicle operator's privilege of said motor common carriers are also sought to be suspended for periods of 90 days each. In said forty other complaints, defendants therein have raised substantially the same legal defenses as would be involved in the determination of the issues raised by this complaint seeking for determination the invalidity of the statute involved herein.

14. Plaintiff herein seeks a determination of the constitutionality of Chapter 95½ Section 229 (b), Illinois Revised Statutes, 1951, as alleged in Paragraph 4 of this complaint, and such a determination will obviate and avoid a multiplicity of said pending suits, and in addition, suits threatened to be filed by the defendants against other additional common carriers which upon information and belief are about to be filed.

Wherefore, plaintiff prays for declaratory judgment under the terms and provisions of Chapter 110, Section 181.1 Illinois Revised Statutes, 1951, declaring that Chapter 95½,

Section 229 (b) paragraphs (d), (e), (g), (h) and (i), Illinois Revised Statutes, 1951 be held unconstitutional and void and that said Paragraphs (d), (e), (g), (h) and (i) of said Section 229 (b) be held for naught; that the defendants and each of them and their successors in office be permanently restrained and enjoined by the order of this Court from instituting further proceedings to suspend plaintiff's commercial motor vehicle operator's privileges for violation of Chapter 95½ Section 228, Illinois Revised Statutes, 1951 in the Circuit Court of Marion County, Illinois or any other Court in the State of Illinois.

[fol. 20] In the Circuit Court of Marion County

Plaintiff prays for such other and further relief as this Court may deem just and proper in the premises.

Hayes Freight Lines Inc., by Axelrod, Goodman & Steiner, Its Attorneys.

Filed for record March 24, 1953. Wesley Griffin, Circuit Clerk, Marion County, Ill.

Motion to Dismiss and for Judgment—Filed March 24, 1953

Defendants, Latham Castle, Attorney General of the State of Illinois, and Basil Wilson, State's Attorney of Marion County, in their own proper person, and by John L. Davidson, Jr., First Assistant Attorney General, move the court to dismiss the Complaint of plaintiff for failure to state a cause of action and for want of equity, and pray for judgment that paragraphs (d), (e), (g), (h) and (i) of Section 229(b), Chapter 95½, Illinois Revised Statutes, 1951, be held constitutional and in full force and effect and decree that the plaintiff's complaint be dismissed for want of equity at the plaintiff's cost.

Latham Castle, Attorney General of the State of Illinois, and Basil Wilson, State's Attorney of Marion County, Defendants, By John L. Davidson, Jr., First Assistant Attorney General.

[fol. 21] In the Circuit Court of Marion County

Order of Dismissal—March 30, 1953

This matter coming on to be heard on the complaint of plaintiff and on the motion of the defendants for to dismiss said complaint, and for judgment and decree, and all parties appearing by counsel, and the court being fully informed in the premises Finds:

1. That the court has jurisdiction of the subject matter and of the parties hereto.
2. That said complaint fails to state a cause of action.
3. That sub-paragraphs (d), (e), (g), (h) and (i), Section 229(b), Chapter 95½, Illinois Revised Statutes, 1951, are constitutional and in full force and effect.
4. Said complaint should be dismissed for want of equity.

It is therefore ordered, adjudged and decreed that the plaintiff declining to plead further, its complaint herein be, and the same is hereby dismissed, and that the defendants and each of them go hence without delay.

Enter: Ward P. Holt, Judge.

Minute Entry of Notice of Appeal—Filed March 30, 1953

Notice of appeal and proof of service thereof, filed March 30, 1953.

Praecipe for record and proof of service thereof filed March 30, 1953.

Alexrod, Goodman & Steiner, Attorneys for Plaintiff-Appellant.

[fol. 22] In The Supreme Court of Illinois

[Title omitted]

Argument and Submission of Cause—May 22, 1953

Now on this day come the parties hereto and this being one of the days set apart for the call of the docket under the rules of this Court, and it appearing to the Court that appellant hath filed herein a duly certified transcript of the record and proceedings of the Court below, together with

printed abstracts thereof, and briefs and arguments of counsel in support of the errors assigned herein, and entered motion to reverse the judgment and remand said cause and for costs, and the said appellees having entered motion to affirm said judgment and for costs procedendo, and said motions being taken under advisement for final hearing, and the Clerk of this Court reporting that said cause is now ready to be taken, and said cause having been argued orally by David Axelrod for appellant and by John L. Davidson, Jr. and Mark O. Roberts for appellees is here submitted for the consideration and judgment of the Court:

Therefore it is ordered by the Court that this cause be and the same is hereby taken under advisement.

[fol. 23] IN THE SUPREME COURT OF ILLINOIS

Appeal from Circuit Court Marion County

No. 32855

HAYES FREIGHT LINES, INC., APPELLANT

vs.

LATHAM CASTLE, Attorney General of the State of Illinois, and BASIL WILSON, State's Attorney of Marion County, Illinois, APPELLEES.

OPINION—September 24, 1953

[fol. 24] Docket No. 32855—Agenda 44—May, 1953.

Mr. CHIEF JUSTICE SCHAEFER delivered the opinion of the court:

Section 132.02 of the Uniform Act Regulating Traffic on Highways (Ill. Rev. Stat. 1951, chap. 95½, par 229b,) provides for suspension of the privilege of operating a commercial vehicle upon the highways when habitual operation in violation of the maximum weight and load limits fixed by section 131 of the act (Ill. Rev. Stat. 1951, chap. 95½, par 228,) is established. Plaintiff filed a complaint in the circuit court of Marion County in which it alleged that an action had been

brought in that court charging plaintiff with 157 violations of section 131, and seeking to suspend its commercial operator's privilege for ninety days. On information and belief, plaintiff also alleged that a second such action was about to be instituted to suspend its privilege for either ninety days or one year because of 144 additional violations. Asserting that the suspension provisions violate the State and Federal constitutions in respects which will be discussed, plaintiff sought a declaratory judgment that they are invalid, and an injunction to restrain the defendants, the Attorney General and the State's Attorney of Marion County, from proceeding further against the plaintiff. The circuit court found the suspension provisions valid, granted defendants' motion to dismiss the complaint, and entered an order of dismissal against the plaintiff, who appeals directly to this court.

The complaint alleges that the plaintiff is a corporation engaged in the transportation of property by motor vehicle as a common carrier, both in interstate and intrastate commerce. It operates 1929 motor vehicles, employs 2059 persons, of whom 736 are utilized in its Illinois operations, and maintains terminals at thirty-five cities in eight States. It conducts interstate operations in ten States, including Illinois, under a certificate of public convenience and necessity issued to it by the Interstate Commerce Commission. It also operates in intrastate commerce within Illinois as a line-haul carrier, pursuant to a certificate of public convenience and necessity issued by the Division of Motor Carriers of the Department of Public Works and Buildings.

It is also alleged that during the time covered by the complaint in the suspension proceeding, plaintiff's vehicles [fol. 25] operated approximately 60,000 vehicle trips over the highways of the State, traveling a total of 30,000,000 miles, and transporting daily 7,500,000 pounds of property, and that only two of the 157 violations charged involved "gross" overloads, as distinguished from "axle" overloads resulting from the shift of cargo during the course of operation of the vehicles.

Plaintiff further alleges that its business as a common carrier constitutes a valuable property right which requires, for its continuous existence, that a regular and uninter-

rupted service both in interstate and in intrastate commerce be performed, and that a suspension of its service for either ninety days or one year may result in financial ruin.

Section 132.02 alone is attacked here. Plaintiff concedes the validity of section 131, and of section 132.01 (Ill. Rev. Stat. 1951, chap. 95½, par. 229a,) which provides a schedule of fines, graduated according to the amount of excess weight, for violation of section 131.

Subsection (b) of section 132.02, which was added to the act in 1951, provides that the privilege of a commercial vehicle operator to operate upon the highways shall be suspended when he shall "habitually operate" in violation of the maximum load and weight limits of section 131. The "commercial vehicle operator's privilege" is defined by section 132.02(a)(3) as "the privilege, recognized or conferred by any law of this state, of any person * * * to operate * * * commercial vehicles * * * upon the public highways of this state." Section 132.02(c) provides that upon conviction of any person for a violation of section 131 the arresting officer shall report the circumstances of the arrest to the Director of the Department of Public Safety, who is required to mail a copy of the report to the person in whose name the offending vehicle is registered. Section 132.02(d) provides that the Director of the Department of Public Safety shall notify the Attorney General whenever a total of ten convictions has been entered during any twelve months' period with respect to vehicles operated by any one operator. It then becomes the duty of the Attorney General to bring a proceeding to suspend the operator's privilege. By subsection (e), the circuit courts and the superior court of Cook County are given jurisdiction of suspension proceedings.

Subsection (g) provides that proof of a total of ten or more convictions for violation of section 131 during any twelve months' period by any one operator constitutes [fol. 26] *prima facie* evidence that the operator has habitually operated in violation of section 131. Subsection (g) further provides that "the court shall not find that a defendant has habitually operated one or more commercial vehicles in violation of Section 131 of this Act unless and until the court shall have considered the evidence to the contrary,

if any, offered by the defendant, and such evidence may include, but shall not be limited to, evidence relating to the character and gravity of such violations and the extent of the operations of commercial vehicles by or on behalf of such defendant upon the public highways of this state which did not involve any such violations."

Subsection (i) provides that whenever the court shall find from the evidence that an operator has habitually operated one or more commercial vehicles in violation of section 131, it shall enter an order suspending the operator's privilege for a period of ninety days. If at any time thereafter, in another suspension proceeding, the court shall find that the operator has again habitually operated in violation of section 131, it shall enter a similar order of suspension for a period of one year. An order of suspension is enforceable by contempt proceedings, (subsection (j),) and operation after suspension is a misdemeanor (subsection (l).)

The plaintiff contends that section 132.02 is invalid under the Federal and State constitutions. The Federal grounds relied upon are the due process, equal protection, commerce and supremacy clauses. The State grounds are the due process and separation of powers clauses, and the requirement of section 11 of article II that all penalties be proportioned to the offense. We shall defer consideration of the contentions raised under the commerce and supremacy clauses of the Federal constitution until the other issues have been discussed.

Statutory provisions for suspension or revocation of licenses of all types upon proof of violation of law are so familiar as not to warrant citation. In the motor vehicle field, the Illinois provision for revocation of the ordinary driver's license for specified statutory violations (among them three convictions for violation of speed limits) (Ill. Rev. Stat. 1951, chap 95½, par. 35j,) is typical of provisions which are uniformly regarded as permissible regulations of the use of the highways. (*People* v. *Kobylak*, 383 Ill. 432; *In Re Probasco*, 269 Mich. 453, 257 N.W. 861; *Commonwealth* v. *Harris*, 278 Ky. 218, 128 S.W. 2d 579; *LaPlante* v. [fol. 27] *State Board*, 47 R. I. 258, 131 Atl. 641; *Commonwealth* v. *Funk*, 323 Pa. 390, 186 Atl. 65; *Prichard* v. *Battle*, 178 Va. 455, 17 S.E. 2d 393.) That such provisions generally aim to foster public safety, while the primary bear-

ing, at least, of the present provision is the protection of the highways from abuse by excessively heavy loads, cannot be a material difference. Plaintiff would also distinguish these cases on the ground that the suspension here "is directed precisely to a prohibition upon the right to engage in a lawful business." But one who uses the public highways for the conduct of his business certainly cannot claim a preferred position. *Bode* v. *Barrett*, 412 Ill. 204; *Weksler* v. *Collins*, 317 Ill. 132.

Plaintiff, however, asserts that that portion of section 132.02(g) which requires the court to consider evidence relating to the character and gravity of the violations and the extent of the operations of the defendant in determining whether there has been habitual operation in violation of the act fails to provide a "reasonable ascertainable standard" and therefore violates both due process and the separation of powers required by article III of the constitution of Illinois. Insofar as the suspension provision is conditioned upon the occurrence of a statutory offense, there is, of course, no question of indefiniteness, for the statutory maximum weight and load limits are expressed in precise units of physical measurement, but it is argued that the terms "character" and "gravity" lack precision, and that they afford no standard by which an operater who has been convicted of a violation of a statutory load limit can tell whether that violation falls "within or without the type of violation for which an operator's privilege may be suspended." As to the factor of "extent of operations," which the plaintiff describes as the "percentage relationship of violations to non-violations," it is said that no measure is prescribed for either the court "or the operator to adjudge or determine that distinctive percentage which falls within the prohibited category, and that which falls without it." In support of this argument plaintiff relies upon *Connally* v. *General Construction Co.*, 269 U. S. 385; *Small Company* v. *American Sugar Refining Co.*, 267 U. S. 233; *United States* v. *Capital Traction Co.*, 34 App. D. C. 592, and other cases in which statutes have been invalidated for want of definiteness.

Neither proposition is sound. It may be conceded, as the plaintiff suggests, that the standards provided do not per- [fol. 28] mit an operator to know in advance whether or

not his conduct, admittedly in violation of the law, will be determined to warrant a finding that he has habitually operated in violation of the act with resulting suspension. From the point of view of the operator it would obviously be desirable to know the precise conditions under which he may violate the law without incurring the risk of suspension of his license. But the desire of the operator is not equivalent to a command of the constitution. Many years ago it was pointed out that "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree." Mr. Justice Holmes in *Nash* v. *United States*, 229 U. S. 373, 377.

The General Assembly is not required to establish an absolute criterion for the revocation of this privilege. It may concern itself with the quality of the conduct which is the basis of revocation. It might express that concern by attempting to enumerate all the conditions of weather, roads, and loads, and the myriad of transitory circumstances peculiar to the business of the offending carrier or to the offense which might be relevant by way of excuse or justification. But no constitutional provision requires it to do so as long as intelligible standards are established to be applied by the agency to which the determination is committed.

While the standards here fixed are expressed in general terms, they deal unmistakably with the quality of the conduct which is made the basis of suspension of the privilege. They include factors relating to the deliberate, negligent, or excusable quality of the violations which are relied upon as a basis for revocation. In this we see no constitutional defect.

The plaintiff also contends that the determination of whether or not there has been operation in habitual violation, and hence of whether or not the privilege to operate should be suspended, is so inherently an administrative function that it cannot, under article III of the constitution, be committed to a court. In support of this argument plaintiff relies on *Borreson* v. *Department of Public Welfare*, 368 Ill. 425. The statute in that case required the court, on an appeal from an administrative agency, to determine *de novo* the amount to be paid to aged persons for old-age

assistance, and it was held that the function was administrative, and could not validly be committed to a court. The determinations involved in the present case, however, are [fol. 29] of the kind which has traditionally been considered judicial. The application of generalized standards—negligence, malice, fraud, and a host of others—to particular conduct was the routine business of the courts long before administrative agencies, as we know them now, came into existence. The issues in a suspension proceeding bear a marked resemblance to the issues which courts decide daily in the administration, for example, of statutes providing for probation and indeterminant sentences. And since the procedure in suspension proceedings is governed by the Civil Practice Act, and an order of suspension is enforceable by contempt, the analogy to injunction is obvious. We hold, therefore, that section 132.02 does not violate the provisions of article III.

Plaintiff also attacks the provision that proof of ten or more convictions for violation of the load limits within twelve months shall constitute *prima facie* evidence of habitual operation in violation of the act. It is contended that this provision discriminates unreasonably against one who operates numerous vehicles on frequent trips and in favor of one who operates fewer vehicles and less frequently. Because a *prima facie* case of habitual operation in violation of the statute may be established against operators whose ratio of unlawful to lawful operations is substantially different, it is urged that the statute creates a discrimination which is invalid under the equal protection clause of the fourteenth amendment.

The argument is not impressive. We are aware of no constitutional provision which would invalidate an absolute rule of suspension for specified violations. Provisions for the suspension or revocation of drivers' licenses for specified violations of law are commonplace. And the fact that these provisions do not take into account the number of miles driven by the respective violators has not, so far as we are aware, been thought to invalidate them. Plaintiff's argument does no more than underscore the wisdom of the authorized inquiry into the circumstances of the violations, an inquiry which the plaintiff elsewhere in its argument so vigorously attacks.

Plaintiff next argues that the *prima facie* test violates due process because an operator may be faced with the burden of defending against a succession of suspension proceedings involving identical violations. It is suggested that an operator who has ten or more violations during a twelve-month period may be found, in view of all the circum- [fol. 30] stances, not to have operated in habitual violation of the law. Upon further convictions for violation of the load limits during the same twelve-month period, a second action under section 132.02 might be instituted and might result in the suspension of such an operator's privilege. The second suspension proceeding is occasioned, however, by the operator's continued conduct, which results in additional violations. Since these additional convictions tend to cast new light on the overall character of his operations, a re-examination of the charge of habitual violation is justified, and in such a re-examination there is no deprivation of due process.

It is also contended that the statute is fatally unreasonable in that it permits inclusion, in the ten offenses which make up a *prima facie* case, of violations due to "axle overloads," which may have been unavoidable. The argument is based upon the fact that section 131 recognizes a category of "unavoidable" axle overloads which are punished by a nominal fine of one dollar. Apart from the fact that the complaint does not allege that any of the violations with which plaintiff is charged are of this character, the contention must fail. There is no basis for assuming that any court would refuse, in a suspension proceeding, to take into account a previous judicial determination that abnormal and unanticipated conditions made it impossible to prevent undue shifting of a particular load. Indeed, such a circumstance would seem to be peculiarly within the authorized scope of inquiry into the "character" of the violation.

It is said that the penalty of suspension of operating privileges is so disproportionate to the offense as to deprive the plaintiff of due process of law and to contravene section 11 of article II of the constitution of Illinois which provides: "All penalties shall be proportioned to the nature of the offense * * *." We do not agree. The State's continuing search for effective enforcement techniques to secure compliance with valid weight limits is apparent in

the legislation dealing with the subject. (See: Act of July 9, 1935, secs. 132, 135, 137, Laws of 1935, p. 1281 ff.; Act of August 6, 1949, secs. 1, 2, 3, Laws of 1949, p. 1142; Act of August 10, 1949, secs. 132, 132.01, Laws of 1949, p. 1156; Act of August 6, 1951, sec. 132.01, Laws of 1951, p. 2090.) The General Assembly might infer that the truckers find the payment of statutory penalties when violation is established to be economically preferable to compliance. But the State is entitled to insist upon compliance with its valid [fol. 31] regulations, and to shape its penalties to that end. Consideration stemming from the commerce clause of the Federal constitution apart, we see no reason why the State may not restrict the privilege of using its highways for profit to those who comply with its laws. If, because of the peculiarities of a particular load, compliance would present inordinate difficulties, provision is made for a permit to exceed the statutory limits. Ill. Rev. Stat. 1951, chap. 95½, par. 230.

We think the sanction imposed here is not disproportionate to the offense. We have previously sustained acts which impose analogous auxiliary penalties such as the confiscation of a vehicle or prohibition of the use of a building, (*People* v. *Kawoleski*, 310 Ill. 498,) as well as acts imposing progressively severer penalties for repeated offenses. (*Kelly* v. *People*, 115 Ill. 583.) *Chicago and Alton Railroad Co.* v. *People ex rel. Koerner*, 67 Ill. 11, on which plaintiff relies, is not authority to the contrary, for we recognized there the propriety of forfeiture in cases of successive violations.

Plaintiff's final contention is that the suspension provisions are invalid under the commerce clause and the supremacy clause of the Federal constitution. While it is conceded that the State has broad powers over the use of its highways in interstate commerce, it is argued that the power of the State does not include the suspension, even for a limited period of time, of the right to engage in interstate commerce, particularly in the case of carriers who hold certificates of convenience and necessity under the Federal Motor Carrier Act. Because the issue presented lies within a sensitive area of State and Federal relations, we have carefully examined the statute to be sure that it was intended to apply to interstate commerce. Its scope is fixed

by the definition of "commercial vehicle operator's privilege" as "the privilege recognized or conferred by any law of this state * * * to operate * * * commercial vehicles * * * upon the public highways of this state." A privilege or right to operate motor vehicles for commercial purposes in interstate commerce is clearly recognized in other statutes. (Ill. Rev. Stat. 1951, chap. 95½, par. 220.13, par. 243.) From this fact, and from the fact that section 132.02 itself does not itself suggest any exemption of operators engaged in interstate commerce, we conclude that the suspension procedure was intended to apply to all operators whether engaged in interstate or intrastate [fol. 32] commerce.

The power of the State over those who use its highways in interstate commerce is extensive. It may prescribe the maximum size and weight of vehicles engaged in interstate commerce, (*South Carolina State Highway Dept.* v. *Barnwell Bros.* 303 U.S. 177,) it may regulate their design, (*Maurer* v. *Hamilton*, 309 U.S. 598,) and it may impose nondiscriminatory fees. (*Hendrick* v. *Maryland*, 235 U.S. 610; *Kane* v. *New Jersey*, 242 U.S. 160.) The suspension provision here involved, however, extends beyond the areas which have been held permissible in the decided cases. The plaintiff has been granted a right to engage in commerce on the highways of Illinois by the Interstate Commerce Commission, acting under part II of the Interstate Commerce Act. (49 U.S.C. sec. 301 ff.) It is that right which is to be suspended under section 132.02.

We are aware of no case which involves the validity of a sanction of this type as applied to interstate motor carriers. In other situations, however, such sanctions have been invalidated under the commerce clause, even though the regulation to which the sanction attached was within the power of the State. So it has been held that payment of a tax otherwise valid may not be made a condition precedent to the right to carry on interstate business, but that enforcement must be left to ordinary collection procedures. (*Postal Telegraph Cable Co.* v. *Adams*, 155 U.S. 688.) Nor may nonpayment of an otherwise valid tax be made the basis of a forfeiture of a corporate franchise to engage in interstate commerce. (*St. Louis Southwestern Railway Co.* v. *Arkansas*, 235 U.S. 350.) In *Hill* v. *Florida*, 325 U.S. 538,

a union business agent who had failed to secure a license required by State law was enjoined from acting as a business agent. The court held that his right to act in that capacity was conferred by the National Labor Relations Act, and that the right so granted could not be obstructed by injunction or by penalty for acting without a license. "It is the sanction here imposed, and not the duty to report, which brings about a situation inconsistent with the federally protected process of collective bargaining." 325 U.S. 538, 543.

In our opinion, the sanction provided in section 132.02 operates directly to restrict a right which the Federal government has granted to engage in interstate commerce, and it is therefore invalid under the commerce clause.

Th fact that the federally granted right of an operator [fol. 33] to engage in interstate commerce cannot be suspended does not, however, impair the validity of section 132.02 as applied to intrastate operations. The continuing power of the State over those operations is expressly recognized by Congress. (49 U.S.C. sec. 302(b).) The statute can operate effectively if its application is restricted to intrastate commerce. And even apart from the separability clause of the statute, (Ill. Rev. Stat. 1951, chap. 95½, par. 239,) section 132.02 itself indicates the intention of the General Assembly to exert the full measure of its power to secure compliance with its valid regulations.

It follows that the decree of the circuit court must be reversed, and the cause remanded, with directions to enter a decree in accordance with this opinion.

(Reversed and remanded, with directions.

[fols. 34-36] IN SUPREME COURT OF ILLINOIS

No. 32855

HAYES FREIGHT LINES, INC., Appellant

vs.

LATHAM CASTLE, Attorney General of the State of Illinois, and Basil Wilson, State's Attorney of Marion County, Illinois, Appellees

JUDGMENT—September 24, 1953

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises, are of the opinion that in the record and proceedings aforesaid, and in the rendition of the decree aforesaid, there is manifest error.

Therefore, it is considered by the Court that for that error and others in the record and proceedings aforesaid the decree of the Circuit Court of Marion County in this behalf rendered, be reversed, annulled, set aside and wholly for nothing esteemed, and this cause be remanded to the Circuit Court of Marion County with directions to enter a decree in accordance with the views expressed in the opinion attached to this mandate.

[fol. 37] [File endorsement omitted]

[fol. 38] In the Supreme Court of Illinois, May Term, A. D. 1953

[Title omitted]

Petition for Rehearing on Behalf of Appellant—Filed October 19, 1953

May it please the Court:

Appellant respectfully petitions for a rehearing in this cause for the reason that the Court in its opinion has misapprehended and overlooked certain principles of law in relation to the issues determined adversely to appellant, as follows:

[fol. 39] I

Penalty of Suspension as Violation of Federal and State Guarantees of Due Process and Article II, Section 2 of Constitution of Illinois

(*Appellant's Brief—Points V, A., B.*)

Appellant's brief, page 51, urges that a 90-day suspension of a commercial motor vehicle operator's privilege would destroy property rights of a value so excessive that it may cause its financial ruin and bankruptcy. The fact that the opinion denies the power to suspend interstate operating privileges of appellant in no way mitigates the severity of the penalty or the potential threat of bankruptcy because appellant's operations in intrastate commerce are extensive and its fixed obligations for mortgages, rental of terminals and equipment absolutely require the continued operation by appellant of both its inter- and intra-state business in Illinois (Appellant's Brief, page 51).

The opinion disposes of this issue on the ground that the Court has "previously sustained acts which impose *analogous* auxiliary penalties such as the confiscation of a vehicle or the prohibition of the use of a building (*People* vs. *Kowalski*, 310 Ill. 498) as well as acts imposing progressively severer penalties for repeated offenses (*Keely* vs. *People*, 115 Ill. 583)." The Court further disposes of the *Koerner* case, offered by appellant, as follows: "*Chicago and Alton Railroad Co.* vs. *People, Ex Rel. Koerner*, 67 Ill.

11, on which appellant relies, is not authority to the contrary, for we recognized there the propriety of forfeiture in cases of successive violations."

It is respectfully submitted that the cases offered by the Court in support of its analysis and decision are not "analogous" as the Court states, and that the Court has misapprehended or overlooked the principles therein enunciated.

[fol. 40] The *Kawolski* case sustained the Illinois Prohibition Act against a challenge that as it provided auxiliary penalties, such as the confiscation of a vehicle or the prohibition of the use of a building, in addition to the penalty, fine, or imprisonment, the Act violated Article II, Section 2 of the Constitution of Illinois, which requires penalties to be proportioned to the nature of the offense.

The power of the State to confiscate or condemn *property which is used in an illegal enterprise* may be conceded. That is the effect and the limitation of the *Kawolski* case. But in the case at bar, the suspension penalty required by Section 132.02 will result in the immobilization and suspension of the privilege of using property which has lawfully been operated in Illinois. It is not only the unlawfully operated vehicle which is barred from the highways, *but the vast number of vehicles which have not been involved in overweight infractions of the law.* The admitted facts are that during the period of operation by appellant under the pending prosecution in the Circuit Court of Marion County appellant engaged in approximately 60,000 vehicle trips over the highways of Illinois, resulting in 157 overweight violations of Section 131 (Abst. 6). The percentage of unlawful operations is approximately one-quarter of one percent. Approximately 99.75 percent of appellant's operations have been lawful, and in the conduct of those operations its terminals and docks and the great majority of its motor vehicles have not been operated illegally. Yet the suspension penalty in practical effect confiscates the property so lawfully used.

Surely it is not the position of the Court that the *Kawolski* case sanctions the appropriation, confiscation or forfeiture, directly or indirectly, as an auxiliary penalty, of property which has not been tainted by employment in an illegal enterprise. This would indeed be an extraordinary extension of

[illegible] concept of police power. This *Kowolski* case is not, [fol. 41] therefore, analogous, and the Court's reliance upon it as precedent is a misapprehension of the principles it expresses.

Keely v. *People*, 115 Ill. 583, relied upon by the Court is also not analogous or relevant. That case does sustain the legislative power to prescribe progressively severer penalties for repeated criminal offenses as provided under the Habitual Criminal Act. But the protection of society against the depredations of the arsonist, rapist, murderer or kidnapper is hardly the equivalent of the state's interest in the conservation of its highways. Nor does the state's power under the Habitual Criminal Act extent to the forfeiture of his property. Generations ago the abhorrent principle that convictions shall work a corruption of blood or forfeiture of estate was abolished from our Anglo-Saxon jurisprudence. Restraints upon the legislative power in this respect were incorporated into our fundamental law (Art. II, Sec. 2, Constitution of Illinois). And, although Section 132.02 does not theoretically violate this principle, is it not a violation of the spirit of that established guarantee when property rights valued in the millions may be rendered worthless, especially under circumstances when the property affected has not been employed in illegal activities?

The *Keely* case is not, therefore, analogous to the statute under consideration and its application to the case at bar is a misapprehension of the law.

In respect to *Chicago and Alton Railroad Co.* v. *People Ex Rel. Koerner*, 67 Ill. 11, heavily relied upon by appellant, the Court, in its opinion, briefly dismisses it as not being authority to the contrary, stating that "we recognized there the propriety of forfeiture in cases of successive violations." This conclusion, appellant respectfully suggests, misapprehends the Court's holding. The forfeiture provision, applicable to a first offense, is stricken down by the Court, [fol. 42] as an unconscionable penalty in violation of the spirit of Art. II, Sec. 2, the Court observing that in some cases this would amount to a fine of millions of dollars (Appellant's Brief, page 52). The decision may suggest, as this Court states, that it "recognized there the propriety of

forfeiture in cases of successive violations," but the case does not involve that issue and moreover, on its facts is not precedent for the suspension penalty provided in Section 132.02. The statute there under consideration authorized a forfeiture of franchise for a *willful* violation of its provisions. Section 132.02 authorized a suspension of operating rights for violations which may be wholly unavoidable, or merely negligent. The distinction is both evident and crucial, for whatever inference the *Koerner* case may give regarding the propriety of forfeiture in cases of successive violations it is a misapprehension of its intendment to suggest that the Court was giving its sanction to a forfeiture penalty heard upon other than willful violations of the law.

In this connection it is appropriate to advert to a misapprehension of the Court in its analysis of this issue. In its discussion of the State's continuing efforts to find effective enforcement techniques to secure compliance with valid weight limits, the Court in its opinion states:

> "The General Assembly might infer that the truckers find the payment of statutory penalties when violation is established to be economically preferable to compliance."

In indulging in this presumption the Court, it is respectfully submitted, is not utilizing authoritative evidence of legislative history for nowhere in the statute or in the Journal of Proceedings of the Illinois House and Senate, or in the records of the committees which considered this 1951 amendment is there any evidence or reference to support this conclusion of legislative judgment which the Court adopts. Nor does the record of this cause on review support [fol. 43] this conclusion; *on the contrary, it is wholly adverse to it.* Since the Court has suggested the factor of possible willful violations and thus introduced the element of intent of the trucker to violate the weight laws, a review of the record must in all fairness be had.

The record is clear and uncontroverted that of the 157 violations of Section 131 by appellant which form the basis of the prosecution in the lower court, only two involve "gross" overloads (Abst 6). The Court there inferred that truckers may prefer the fines incident to overweight viola-

tions rather than submit to compliance with the law. In effect it is suggested that as a matter of economies it may be wise for the truckers to deliberately violate Section 131 since the added revenues derived from the excess tonnage carried will more than offset the fines provided in Section 131. The argument has plausibility only in respect to "gross" overloads. Obviously axle overloads which do not involve gross overloads can in no way contribute to the inferred profit motive underlying deliberate violations. It is only by overloading a truck beyond its permissible gross load limits that a carrier can trade his integrity for a profit. Thus, the record before the Court which establishes that 155 out of 157 violations involved *only* axle overloads *negates the imputation of deliberate intent to violate the law as an economically preferable alternative to compliance.*

Moreover, on the issue of good faith or intent, the Court's attention is again invited to Exhibit B of Appellant's Brief, consisting of Report and Orders of the Interstate Commerce Commission, in which the Commission, in a contested proceeding, determined appellant to be a fit, willing and able operator for extended interstate operating authority. At page 95 of Appellant's Brief, the Commission considered appellant's record of overweight violations in Illinois and concluded as follows:

> "Except for overweight violations, applicant has a [fol. 44] good record in Illinois; and, as noted, these were axle overweights rather than excess gross tonnage violations. *There is plausibility, and possibly some merit, in applicant's contention that some of these violations were due to the shifting of cargo in transit;"* (Emphasis supplied.)

If further evidence be needed respecting the Court's misapprehension of the legislative purpose of Section 132.01 as applied to appellant's record in relation to the profit motive, it is again noted that out of 60,000 vehicle trips covering 9,000,000 miles traversed on Illinois highways, only 157 violations occurred, a violation ratio of approximately one-quarter of one percent (Abst. 6).

Appellant has felt constrained to emphasize this issue

because of its deep concern over the gratuitous assertion by the Court imputing to appellant (and other motor carriers) a policy of deliberate violation of law as a basis for its holding that the suspension penalty is not unconstitutionally harsh or oppressive. Appellant is only one of approximately 40 other motor carriers presently being prosecuted under the suspension provisions of Section 132.01 (Abst. 13). *Appellant is sincere in its conviction that it operates its business efficiently, with due regard to its public obligations.* It has every reason to believe that the operations of each of the other defendants in such pending actions are likewise being efficiently operated. Yet despite efficient management and conscientious efforts to comply with the weight laws, appellant and these other carriers, both large and small, have found it difficult to avoid overweight violations which subject them to the threat of involuntary bankruptcy through the application of the suspension provisions of Section 132.01. The statute thus imperils the existence of an entire industry which is essential to the welfare and progress of the people of this State.

[fol. 45] The State's interest in the conservation of its highways is undeniably important and in the adjustment of a balance between a lawful industry required to use the public highways and the legitimate interest of the State in conserving those highways, the reasonableness of the suspension penalty must be evaluated. Appellant contends that *a suspension penalty which virtually assures bankruptcy and which in effect is a forfeiture or fine of extraordinary proportions, is an unconscionable and excessive penalty and an arbitrary exercise of police power.*

Appellant asks: if Section 132.02, instead of providing a suspension penalty, required imposition of a fine of $1,000,000.00 upon conviction of 10 overweight violations, would this be a valid police regulation? It is respectfully submitted that such a statute would in all likelihood shock the conscience of the Court and be invalidated on due process grounds. Yet Section 132.02, in its present suspension provisions, does precisely this by indirection.

Finally, *Robison* v. *Miner*, 68 Mich. 549 (Appellant's Brief, p. 53), not noted by the Court in its opinion, deserves re-mention. In holding invalid a statute which provided a

disability to engage in an otherwise lawful business, in addition to fine and imprisonment, the Court said:

> "It is equally clear that any fine or penalty is excessive which seriously impairs the capacity of gaining a business livelihood. *The penalties in this act, which are imperative and not discretionary, must necessarily break up business, and are not measured by standard or amount. The only measure of restraint is the value of the business broken up, and this may reach tens of hundreds of thousands of dollars.*
>
> *"It is safe to say that throughout the United States any fine or forfeiture is unusual which has not some limitation of value. • • • Disability to transact business is almost or quite unheard of in this country."* (Emphasis supplied.)

[fol. 46]

II

The Power of Suspension is a Legislative or Administrative Power and its Delegation to the Courts Violates the Separation of Powers Doctrine of Article III of the Constitution of Illinois

(*Appellant's Brief, Point IV; Appellant's Reply Brief, Point III D*)

The Court, in its opinion, disposes of this contention with the following statement:

> "The determinations involved in the present case, however, are of the kind which has traditionally been considered judicial. The application of generalized standards—negligence, malice, fraud and a host of others—to particular conduct was the routine business of the courts long before administrative agencies, as we know them, came into existence. The issues in a suspension proceeding bear a marked resemblance to the issues which courts decide daily in the administration, for example, of statutes providing for probation and indeterminate sentences. And since the procedure in suspension proceedings is governed by the Civil Practice Act, and an order of suspension is enforceable by contempt, the analogy to injunction is obvious."

Appellant respectfully submits that the foregoing disposition of the issue misapprehends the law and appellant's argument in the particulars to be noted.

Section 132.02 designates that in a suspension proceeding the Court shall take into account generalized standards pertaining to character and gravity of violations and the relationship of lawful to unlawful operations of the operator. What these terms mean, and what effect shall be given to a determination of these factors, is nowhere indicated in the statute. Appellant has argued that they may mean a number of things including questions of negligence, wilful misconduct, or unavoidable and accidental violations. [fol. 47] But whatever they mean, these determinations are not comparable to the judicial function exercised in the ordinary adversary civil or criminal action where the issue of guilt or liability depends upon equating particular conduct to general standards such as fraud or negligence. In such proceedings fraud or negligence constitute the ultimate issues upon which innocence or guilt will be predicated in matters involving standards of conduct particularly within the province of a court or jury. In the instant case, however, the ultimate issue is not negligence or wilful misconduct but rather the issue of fitness or ability (which is the net practical effect of the application of the statute) of regulated carriers to perform services authorized by certificates of public convenience and necessity. That this power is essentially legislative or administrative must be conceded by the fact that its exercise is now entrusted to the Department of Public Works and Buildings in its administration of the Illinois Truck Act.

Clearly, a statute which would empower courts to determine the issue of public convenience or necessity, in an original proceeding would violate the principle of separation of powers (Appellant's Brief, p. 41 *et. seq.* discussion under *Cromwell* v. *Jackson*, 52 A. (2d) 79). In like manner, the power to suspend a license or privilege upon grounds of lack of fitness or ability is an administrative power under the Illinois Truck Act (Chap. 95½, Sec. 277, Ill. Rev. Stats. 1951). This principle is not one of abstract speculation in this State. In *People* v. *Applebaum*, 251 Ill. 18,

cited by appellants (Appellant's Reply Brief), the court said:

> "Neither the granting nor the revocation of a license is the exercise of judicial power as that term is understood in reference to the distribution of the powers of government."

[fol. 48] More pertinent to the issues of this case, however, is *State* v. *Huber*, 129 W. Va. 198, 40 S. E. 2d 11, 168 A. L. R. 808 (1946), *not heretofore cited by appellant*. In that case, a statute was held unconstitutional under the separation of powers principle which gave concurrent and original jurisdiction to courts of record to entertain complaints relating to alleged violations of law in respect to the sale or distribution of beer and which authorized the suspension or revocation by the court of licenses issued by the State Liquor Commission. In an exhaustive and illuminating judicial analysis, the court, among other conclusions, states, p. 215 (W. Va.):

> "• • • if we sustain the present law conferring jurisdiction on courts of record to revoke licenses to sell non-intoxicating beer, it will, in principle, amount to total destruction of the theory of separation of power."

The true limits of the judicial power are noted in the following statement, p. 222 (W. Va.):

> "But considerations of high public policy, and the plain terms of our Constitution, impel us to the conclusion that the licensing and regulation of the sale and distribution of non-intoxicating beer is the exclusive function of the legislative department of our government under the police power of the State; *is not a judicial function; and cannot be made the subject of the exercise of judicial power*, save only in cases where in the exercise by the legislature of its power in the premises, there is a violation of the Constitution, or some arbitrary or fraudulent exercise of that power, or its exercise is without excuse or without evidence, which itself would be an arbitrary exercise of power.

Then and only then, may judicial power be invoked.
• • •"

When, therefore, this Court in its opinion states that the power of suspension of operating rights granted under [fol. 49] certificates of public convenience and necessity is a traditional judicial function, it has misapprehended and overlooked the true principle of law respecting separation of powers.

The fact that a suspension order is enforceable by contempt, as stated by the Court, does not make the basic power of suspension judicial. The appendage of an admittedly collateral judicial power to an action or proceeding which is legislative or administrative cannot change the character of the underlying power. If this were so a law vesting in the General Assembly the judicial power to hear and determine cases or controversies in law or equity would become a valid exercise of legislative power if the law reserved to the legislature, the power to amend or repeal such legislation.

It is respectfully submitted, therefore, that this Court has misapprehended the nature of the power vested in the courts under Section 132.02; that such power is legislative or administrative and that the power of suspension, dependent as it is upon the determination of the issue of fitness and ability, cannot be delegated to the court in the face of the proscription of Article III of the Constitution of Illinois.

[fol. 50]

III

Section 132.02 Fails to Define the Offense for which Suspense is Directed on Violation of the Due Process Limitations of the Federal and State Legislations; by Delegating to the Courts the Power to Define the Offense it Further Violates the Separation of Powers Doctrine of Article III of the Constitution of Illinois

(Appellant's Brief, Points IA and IV B, and Appellant's Reply Brief, Point IIIA)

It is Appellant's earnest conviction that the Court, in its opinion on these issues, has overlooked or misapprehended

the principles respecting the definition of an offense as they relate to the legislative power under due process and the judicial power under Article III of the Constitution of Illinois. The Court states as follows:

> "While the standards here fixed are expressed in general terms, they deal unmistakably with the quality conduct which is made the basis of the suspension of the privilege. They include factors relating to deliberate, negligent, or excusable quality of the violations which are relied upon as a basis for revocation. In this we see no constitutional defect."

In its analysis the Court emphasizes the issue from the viewpoint of the potential violator of the statute, stating that for him.

> "it would obviously be desirable to know the precise conditions under which he may violate the law without incurring the risk of suspension of his license. But the desire of the operator is not equivalent to a command of the Constitution".

Conceding for the purpose of this issue that the operator is sufficiently forewarned that any violation of Section 131.01, regardless of the character or gravity thereof, subjects him to the risk of the suspension of his license, the [fol. 51] point nevertheless remains that each Court or jury, in its evaluation of the conditions underlying the violations, determines *in its uncontrolled discretion*, the legal effect to be given to any record of violations and thus *in effect defines the offense of habitual violation*. The Court or jury does not apply the law—it makes the law—*for it has no directive from the legislature*, other than the undefined concepts of "character and gravity" of the violations and "the extent of the operations of the carrier which did not involve violations," by which it is to determine if the defendant is guilty of habitual violation. As stated in *State* v. *Lantz*, 90 W. Va. 738 (Appellants Reply Brief, p. 19), "There would be as many different standards as there would be different opinions among the "juries and judges trying the cases as the same arise". It is this phase of the issue which the Court has not treated in the opinion and

which leads Appellant to the conclusion that the same may have been overlooked. Appellant respectfully invites the attention of the Court to its analysis of the issue, particularly under Point IV B of Appellants Brief and Point VIII A of Appellant's Reply Brief.

IV

The Prima Facie Test of Violation Denies Appellant the Equal Protection of the Laws and Deprives it of Due Process of Law

(Appellant's Brief, Point II)

Appellent has contended that the prima facie test of 10 violations unreasonably discriminates against the large commercial motor vehicle operator (Pages 32-36, Appellant's Brief). The Court, in its proposed opinion, disposes of this as follows:

> "We are aware of no constitutional provision which [fol. 52] would invalidate an absolute rule of suspension for specified violations. Provisions for suspension or revocation of drivers' licenses for specified violations of law are commonplace, and the fact that these provisions do not take into account the number of miles driven by the respective violators has not, so far as we are aware, been thought to invalidate them."

Customarily it is true, as the Court states, that an absolute, uniform rule of suspension applicable to all persons alike cannot be challenged on due process or equal protection grounds. The very fact of uniformity in the ordinary case, is the guarantee of its validity. But this is not the ordinary case; it is unique and extraordinary and has never before been the subject of judicial analysis. *In the statute under review, the very fact of uniformity creates the discrimination.* The bracketing into one class of the 1000 vehicle operator and the single truck operator renders the burdens of compliance upon the former more difficult and severe than upon the latter and makes the application of the law and the penalty discriminatory *by reason of the uniformity of the law.* This is a wholly novel situation to which the principles and standards applicable in the ordi-

nary cases become dubious and uncertain. The analogy employed by the Court concerning the irrelevancy of the number of miles driven by a violator misapprehends the distinction, for we are not dealing here with the suspension of the personal privilege of operating a motor vehicle, but with the suspension of the privilege to carry on a lawful business. And in the conduct of a business employing 1000 vehicles and several thousand employees, the unavoidable margin of human error arising from acts which can never be completely guarded against, as well as the unavoidable and innocent violations resulting from the shifting of cargo, will necessarily place a large carrier in a position of discrimination as opposed to the small operator who can more effectively control his compliance with the [fols. 53-54] law. Appellant is mindful of the difficulty of defining legislative classifications graded according to miles traveled or motor vehicle units employed, but this difficulty, which is a legislative problem, does not mitigate the fact of unequal and discriminatory application of the present law.

Therefore it is respectfully suggested that the rule of uniformity urged by the Court in support of the law, as applied to new and extraordinary circumstances in which the uniformity *creates* the discriminatory and unequal application of the law, is not a reasonable measure of the State's power in respect to this issue.

Conclusion

Because of the foregoing points misapprehended or overlooked in the opinion, appellant respectfully requests that a rehearing be granted in respect to the issues noted.

Respectfully submitted, Axelrod, Goodman & Steiner,
Attorneys for Plaintiff-Appellant.

[fol. 55] Filed. Oct. 19, 1953. Earle Benjamin Searcy, Clerk.

[File endorsement omitted.]

[fol. 56] In The Supreme Court of Illinois, May Term, A. D. 1953.

[Title omitted]

Appellee's Petition for Rehearing—Filed Oct. 19, 1953

Appellees, the Attorney General of the State of Illinois and the State's Attorney for Marion County, respectfully suggesting that this Court has overlooked or misapprehended the considerations stated in the Suggestions in Support of this Petition, earnestly move this Court to grant a rehearing in this cause.

Respectfully submitted, Latham Castle, Attorney General of the State of Illinois, Supreme Court Building, Springfield, Illinois, Attorney for Defendants-Appellees; John L. Davidson, Jr., First Assistant Attorney General; William C. Wines, Assistant Attorney General; Lee D. Martin, Assistant Attorney General; Mark O. Roberts, Special Assistant Attorney General, Of Counsel.

[fol. 57] Suggestions in Support of This Petition

I

This Court Has Decided an Important Question Upon Considerations and in the Light of Authorities Not Cited in the Brief. Courts More Readily Grant Rehearings in Such Cases Than in Cases in Which All of the Arguments Advanced and Authorities Relied Upon Were Presented By the Parties.

This Court has decided a very important question as to the partition of sovereignty between the Federal and State governments, candidly stating that it is

> "aware of no case which involves the validity of sanction of this type as applied to interstate motor carriers • • • "

and that

> "The issue presented lies within a sensitive area of State and Federal relations."

The Court, recognizing the moment of the question, has exerted its own diligence in canvassing the authorities and considering the principles of Federal constitutional law that it deems controlling.

It is eminently proper that a court should make its own study of relevant authorities and principles. But where it does so, it should, we submit, grant rehearing more readily than it will in cases where the theory upon which the case has been decided was fully explored in the briefs and at the bar.

[fol. 58] II

Detroit-Cincinnati Coach Line, Inc. v. Public Utilities Commission of Ohio,— Ohio —, 164 N. E. 356, Is Very Much in Point.

The court stated that it was

> "aware of no case which invoives sanctions of this type as applied to interstate motor carriers".

Detroit-Cincinnati Coach Line, Inc., v. *Public Utilities Commission of Ohio*,— Ohio —, 164 N. E. 356, cited by the Supreme Court of Ohio, is, however, very much in point. In that case the Public Utilities Commission revoked the *State* permit of an interstate carrier, with the consequence that if the order was valid, the carrier could engage in neither intrastate *nor interstate* commerce.

In sustaining this order, the court said in the last paragraph of its opinion:

> "The only problem presented by this proceeding is whether the state authorities can enforce that obedience by the extreme process of revocation of the interstate right altogether. The persons operating motor vehicles upon state highways as common carriers in interstate commerce are guaranteed against unreasonable interference and unreasonable burdens, but this immunity does not justify such persons in becoming outlaws or abusing franchises thus given to them. We are of the opinion that the right of revocation and prohibition is necessary to the maintenance of a proper respect for state laws and state institutions. We are further of the opinion that such revocation upon such

grounds does not offend against the provisions of section 8 of article 1 of the Federal Constitution, though it of course should not be resorted to except in aggravated cases. The commission has found this to be an aggravated case, and its order should be affirmed."

"Order affirmed."

[fol. 59]

III

The Suspension Provisions Are a Reasonable and Valid Exercise of the State Police Power to Conserve the Public Highways. If the Provisions Are Valid as to the Citizens of Illinois and Those Engaged in Intrastate Commerce Then, a Fortiori, the Provisions Must Be Valid as to Those Engaged in Interstate Commerce.

The Court's presently standing opinion recognizes the reasonableness and therefore the constitutional validity of the sanctions imposed by the Uniform Act Regulating Traffic on Highways (Ill. Rev. Stat. 1951, Ch. 95½, Par. 229 (b)) as applied to those who, by repeated overloading of trucks, wreak havoc upon the highways that the taxpayers of Illinois have built as thoroughfares for state and national commerce. The Court recognizes the sanctions as applicable even to those engaged in interstate commerce; for it permits the revocation of the *intrastate* privilege of using the highways even when the violation for which the privilege is rescinded is in respect to interstate transport.

But, says the Court, the privilege of locomotion on the state's highways may not be denied with respect to

> "the right to engage in interstate commerce, particularly in the cases of carriers who hold certificates of convenience and necessity under the Federal Motor Carrier Act."

In reaching this conclusion, we respectfully submit that the Court overlooked the following important considerations:

Where a state exercises its police power to preserve its citizens from death, injury or the economic law attendant upon the destruction of highways, it exercises an attribute of sovereignty far different from that which it exerts in

[fol. 60] the levy of a tax. Indeed, one of the paramount reasons for the forging of the Union by the Constitution of the United States was to prevent invidious discriminations by onerous taxes against "commerce among the several States" and to do away with the system of duties, imposts, tariffs and other taxes that completely sovereign governments are wont to levy against each other's goods. No such considerations are exigent when the matter is one of protecting life, limb and property from destruction.

Indeed—and the presently standing opinion does not advert to this consideration *by enforcing the sanctions imposed by the present act, the State preserves its highways for interstate*, as well as intrastate, *travel and thereby, far from discriminating* against *or burdening, actually facilitates and fosters interstate commerce.*

Hence, we respectully suggest that all of the tax cases cited by the Court in its opinion or relied upon implicitly in its reasoning are signally distinguishable from the case at bar. Such are *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688, and *St. Louis, Southwestern Ry. Co.* v. *Arkansas*, 235 U. S. 350, cited by the Court at folio 9 of its present opinion.

IV

The Legislation Under Which Appellant Was Granted the Right to Engage in Interstate Commerce (Part II of the Interstate Commerce Act, 49 U. S. C. 301, et seq.) Expressly Reserved to the States the Right to Enforce as to Interstate Motor Carriers the Sanction Provided in Section 132.2.

Part II of the Interstate Commerce Act, under which appellant claims the right to engage in interstate motor carrier operation, provides (sec. 226, 49 U. S. C. 326):

> "The Commission is hereby authorized to investi-[fol. 61] gate and report on the need for Federal regulation of the sizes and weight of motor vehicles and combinations of motor vehicles * * *."

This provision was considered by the Supreme Court of the United States in *Maurer* v. *Hamilton*, 309 U. S. 598, and the Court discussed its legislative history quite extensively. Relying upon this provision and its legislative history the

Court held valid a statute of Pennsylvania which banned absolutely from the highways use of vehicles which had been expressly authorized to operate by the Interstate Commerce Commission under Part II of the Interstate Commerce Act.

The Court quoted and obviously relied upon for authority in reaching its decision the following statements, explaining the above quoted section 225, from the testimony of Joseph B. Eastman before the Senate Committee on Interstate Commerce while the Committee was considering the legislation which became Part II of the Interstate Commerce Act. Mr. Eastman was the chief author of the legislation and was a member of the Interstate Commerce Commission and Federal Coordinator of Transportation. He said (309 U. S. pp. 608, 609):

> "But on this question of sizes and weight of motor vehicles which is an extremely important matter from the standpoint of public safety and convenience, there is not only the question here as to what those sizes and weights ought to be from the standpoint of road construction and road use, but there is also the legal question as to whether the Federal government can exercise power over the matter or whether it is a matter exclusively within the jurisdiction of the states. It was because of doubts not only as to the facts with reference to that matter, but also to the law that provisions were made for this investigation."
>
> • • • • • • •
>
> "with respect to size and weight of vehicles • • • we do not undertake in this bill to cover that situation [fol. 62] except to provide for a thorough investigation of it by the Commission with recommendations to Congress because there is involved not only the question of fact as to what the regulations should be, but also as to how far the federal government has power to interfere with the exercise of the police power of the states with respect to the use of their highways. They have the right to protect their highways against unsafe or unreasonable use, but whether or not the federal government can come in and interfere with it I cannot say at this time."

Maurer v. *Hamilton*, *supra* (309 U. S. 598), was decided in 1940, but Congress has made no attempt to impair the power of the states relating to the regulation of sizes and weight of motor vehicles.

The motor carrier involved in *Maurer* v. *Hamilton* had been granted a certificate of public convenience and necessity by the Interstate Commerce Commission to operate as an interstate motor carrier, just as has appellant in the instant case. Further, after a hearing the Commission held that the vehicles affected by the Pennsylvania statute could be lawfully operated pursuant to such certificates despite the state law. But the Court held that the state had the absolute and unfettered right to ban the vehicles in question from its roads, by reason of the reserved power in the state which Congress had not attempted to disturb.

In *South Carolina* v. *Barnwell Bros.*, 303 U. S. 177, the Court held valid a state law limiting the total gross weight (weight of vehicle and load) of a single vehicle or combination of vehicles to 20,000 pounds, despite the admitted fact that the law prevented many interstate motor carriers from conducting *any* operations in the state.

In discussing the state's power the Court made a statement of particular significance here. The motor carriers [fol. 63] objected that the 20,000 pounds gross weight limitation was a wholly irrational method of preventing damage to the roads. They presented evidence that wheel and axle weights were the critical factors in pavement damage and not gross weight, and that the roads could be better protected by wheel and axle weight limitations which at the same time would not deny to the carriers the use of their vehicles that was denied by the 20,000 gross weight law. Admitting for purpose of argument the soundness of this contention, the Court nevertheless held the 20,000 pounds gross limitation valid simply *because it was easier to enforce* than a wheel or axle weight limitation. The Court said (303 U. S. pp. 192-3):

> "* * * The choice of a weight limitation based on convenience of application and consequent lack of need for rigid supervisory enforcement is for the legislature, and we cannot say that its preference for the one over the other is in any sense arbitrary or unreasonable. * * * "

Illinois could by statute ban all vehicles with a gross weight of more than 20,000 pounds, and that would prevent appellant from conducting any operations at all. The United States Supreme Court directly so held in the *Barnwell* case. By thus keeping the big motor carriers off the highways the state could avoid the evils of overloaded trucks. But the state has not as yet elected to pursue such a drastic remedy. Instead it permits motor carriers to carry loads which are sufficiently large to permit an economic business operation, but it has conditioned its permission to carry such loads on strict compliance with the law. It has just as much right to exercise its reserved powers to protect its highways in that fashion as the states had in the exercise of the powers considered in the *Maurer* and *Barnwell* cases. In those two cases the states imposed an absolute, perpetual ban; in the instant case the ban is for [fol. 64] only ninety days. And the ninety days' prohibition is applied only to a carrier who has demonstrated by its conduct a clear intention to defy the state's reasonable truck weight requirements. *Maurer* v. *Hamilton*, *supra* (309 U. S. 598), and *South Carolina* v. *Barnwell Bros.*, *supra* (303 U. S. 177), carefully read, are clear authority to sustain the Illinois statute.

So also are the earlier cases, decided before Part II of the Interstate Commerce Act was enacted. In *Sproles* v. *Binford*, 286 U. S. 374, a Texas statute was held valid which limited the *net load* which could be carried on a vehicle or combination of vehicles to 7,000 pounds. The reason assigned for validity was *ease of enforcement*.

In *Morris* v. *Duby*, 274 U. S. 135, an order of the Oregon Highway Commission reduced the permissible truck gross weight (vehicle and load) from 22,000 to 16,500 pounds. This order and the Oregon statute under which it was made were held valid, despite the undisputed evidence that it would ban certain interstate trucking operations. The Court said (274 U. S. p. 144):

> "The mere fact that a truck company may not make a profit unless it can use a truck with a load weighing 22,000 or more pounds does not show that a regulation forbidding it is either discriminatory or unreasonable."

In the Oregon case the State Highway Commission permanently banned certain motor carrier traffic as a means of conserving the state's roads. That action was held valid. In this case the ban is for only ninety days, and applies to only one carrier.

It is clear from these cases that the state has the power exercised in the Illinois act to protect its highways from damage, and it is further clear that Part II of the Inter-[fol. 65] state Commerce Act, under which appellant claims the right to operate in interstate commerce, has reserved that power to the state.

We respectfully invite the court's attention to another case involving suspension of an interstate carrier by a State for violation of State regulations. In *Welsh* v. *New Hampshire*, 306 U. S. 79, the Supreme Court of the United States, which affirmed the Supreme Court of New Hampshire which held valid a suspension of the right to operate on the highways of New Hampshire of an interstate carrier by the Public Service Commission of that State pursuant to a State statute. Welsh was a Massachusetts corporation doing business as a carrier by truck. Ninety-nine per cent of its business was interstate. It was charged with violating a statute of Massachusetts which forbade the owner of any motor vehicles on its highways to allow any driver on its highways to operate continuously for more than twelve hours.

Under the Motor Carrier Act the Interstate Commerce Commission was empowered to prescribe maximum hours and services. Such regulations were established prior to the effective date of the suspension order of the New Hampshire Commission. The effective date of the Interstate Regulations was January 31, of 1939. Subsequent to the suspension by New Hampshire, the United States Supreme Court in affirming said:

> A. "The roads belong to the State. There is need of local supervision of operation of motor vehicles to prevent collisions, to safeguard pedestrians, and the like. Unquestionably, reasonable regulations of periods of continuous driving is an appropriate measure. In view of the efforts of governmental authorities everywhere to mitigate the destruction of life, limb,

and property resulting from the use of motor vehicles, it cannot be inferred that Congress intended to supersede any state safety measure prior to the taking [fol. 66] effect of a federal measure found suitable to put in its place. Its purpose to displace the local law must be definitely expressed. *Hintz* v. *Baldwin*, 289 U. S. 346, 350.

B. "The rule applicable is clearly stated in *Illinois Central R. Co.* v. *Public Utilities Comm'n.*, 245 U. S. 493, 510: 'In construing federal statutes enacted under the power conferred by the commerce clause of the Constitution • • • it should never be held that the Congress intends to supersede or suspend the exercise of the reserved powers of a State, even where that may be done, unless, and except so far as, its purpose to do so is clearly manifested'."

The court refers to the right of appellee to engage in interstate commerce. As we pointed out on page 56 of our brief, the Motor Carrier Act expressly provides "(9b) No certificate issued under this chapter shall confer any proprietary or property rights in the use of Public Highways," (Sec. 7 Motor Carrier Act).

We have searched in vain for cases holding that the license, permit or certificate of which appellant claims by its pleading to have under the Federal Motor Carrier Act has any or ever intended such effect that the holder may have a vested right to operate in defiance of the exercise of police powers of the several States in controlling the public highways of those States. We have considered carefully *Postal Telegraph Co.* v. *Adams*, 155 U. S. 688; *St. Louis, S. W. Ry.* v. *Arkansas*, 235 U. S. 350, and *Hill* v. *Florida*, 325 U. S. 538. The first two cases involve the exercise of the taxing powers of the State and the right of a State to enfore its tax levy by suspending interstate commerce. The third case, *Hill* v. *Florida*, was in an area to set labor relations in which the Federal Government had granted rights and laid down regulations. It did not involve facilities, in the instant case highways, built by the State's taxpayers.

When it is reflected that Illinois imposes license fees far [fol. 67] higher than those of neighboring states,—so high

that they have been assailed as confiscatory (*Bode* v. *Barrett*, 412 Ill. 204; 73 S. Ct. 468), there is irony in reflecting that the State must suffer the destruction of its roads by denizens of other States while its own citizens are proscribed from using highways they they may destroy but at least helped to build.

We anticipate that it may be suggested that in the future highways over which appellant travels may have been constructed under grants from the United States Government. That argument was long ago advanced and rejected by the Supreme Court in *Morris* v. *Dubey*, 274 U. S. 135.

V

Congress Would Have No Power Under the Federal Constitution to Deprive the States of the Right to Enforce as to Interstate Motor Carriers the Sanction Provided in Section 132.02. The Legislative History of Part II of the Interstate Commerce Act shows That Doubt as to the Power of Congress in This Respect Caused Congress to Reserve This Right to the States

In the few cases where the point has been considered the Supreme Court of the United States has held that a state in the management or protection of its own property, where that property is itself not used by the state in interstate commerce, is not subject to the restraints of the commerce clause. See *Geer* v. *Connecticut*, 161 U. S. 519; *Hudson County Water Co.* v. *McCarter*, 209 U. S. 249; *Silz* v. *Hesterberg*, 211 U. S. 31; and *Bayside Fish Flour Co.* v. *Gentry*, 297 U. S. 422.

In building, maintaining, and regulating the operation of its highways the state is not engaged in interstate commerce and is not employing its property, the highways, in [fol. 68] interstate commerce. See *Henderson Bridge Company* v. *Kentucky*, 166 U. S. 150; and *Detroit International Bridge Co.* v. *Corporation Tax Appeal Board*, 294 U. S. 83.

It follows from these cases that Congress could not, if it wished, deprive the state of the power to regulate the weight of vehicles using its highways or to invoke the sanction of the statute here in question.

But of course Congress has not attempted to deprive the states of these powers; on the contrary, Congress has ex-

pressly reserved these powers to the states. These cases are referred to in connection with the expression by Mr. Eastman before the Senate Committee on Interstate Commerce of his doubt as to the power of Congress to invade this right of the states. These cases are pertinent here as showing the basic authority of the states to protect and regulate their property free from the restrictions of the commerce clause.

Wherefore, appellees request the Court to grant a rehearing of that part of its decision holding that the statute in issue cannot be enforced as to interstate motor carrier operations.

Respectfully submitted, Latham Castle, Attorney General of the State of Illinois, Supreme Court Building, Springfield, Illinois, Attorney for Defendants-Appellees.

John L. Davidson, Jr., First Assistant Attorney General, William C. Wines, Assistant Attorney General, Lee D. Martin, Assistant Attorney General, Mark O. Roberts, Special Assistant Attorney General, Of Counsel.

[fol. 69] IN SUPREME COURT OF ILLINOIS

[Title omitted]

ORDER DENYING APPELLANT'S REHEARING AND ALLOWING APPELLEES' REHEARING—November 16, 1953

And now, on this day, the Court having duly considered the petitions for rehearing filed herein, and being now fully advised of and concerning the premises;

It is hereby ordered, that the petition for rehearing filed by Hayes Freight Lines be, and the same is, hereby denied;

It is further ordered, that the petition for rehearing filed by Latham Castle, Attorney General, be, and the same is, hereby allowed.

[fol. 70] IN SUPREME COURT OF ILLINOIS

[Title omitted]

REARGUMENT AND SUBMISSION OF CAUSE—November 20, 1953

Now on this day come the parties hereto and this being one of the days set apart for the call of the docket under the rules of this Court, and it appearing to the Court that a rehearing having been allowed herein and appellant having filed herein a duly certified transcript of the record and proceedings of the Court below, together with printed abstracts thereof, and briefs and arguments of counsel in support of the errors assigned herein, and entered motion to reverse the judgment and remand said cause and for costs, and the said appellees having entered motion to affirm said judgment and for costs and procedendo, and said motions being taken under advisement for final hearing, and the Clerk of this Court reporting that said cause is now ready to be taken, and said cause on briefs, petition for rehearing, answer and reply is here resubmitted for the consideration and judgment of the Court:

Therefore it is ordered by the Court that this cause be and the same is hereby taken under advisement.

[fol. 71] IN SUPREME COURT OF ILLINOIS

No. 32855

HAYES FREIGHT LINES, INC., Appellant

vs.

LATHAM CASTLE, ATTORNEY GENERAL OF THE STATE OF ILLINOIS, ET AL., etc., Appellees

OPINION ON REARGUMENT—January 20, 1954

[fol. 72] Docket No. 32855—Agenda 31—November, 1953.

MR. CHIEF JUSTICE SCHAEFER delivered the opinion of the court:

Section 132.02 of the Uniform Act Regulating Traffic on Highways (Ill. Rev. Stat. 1951, chap. 95½, par. 229b,) pro-

vides for suspension of the privilege of operating a commercial vehicle upon the highways when habitual operation in violation of the maximum weight and load limits fixed by section 131 of the act (Ill. Rev. Stat. 1951, chap. 95½, par. 228, is established. Plaintiff filed a complaint in the circuit court of Marion County in which it alleged that an action had been brought in that court charging plaintiff with 157 violations of section 131, and seeking to suspend its commercial operator's privilege for ninety days. On information and belief, plaintiff also alleged that a second such action was about to be instituted to suspend its privilege for either ninety days or one year because of 144 additional violations. Asserting that the suspension provisions violate the State and Federal constitutions in respects which will be discussed, plaintiff sought a declaratory judgment that they are invalid, and an injunction to restrain the defendants, the Attorney General and the State's Attorney of Marion County, from proceeding further against the plaintiff. The circuit court found the suspension provisions valid, granted defendants' motion to dismiss the complaint, and entered an order of dismissal against the plaintiff, who appeals directly to this court.

The complaint alleges that the plaintiff is a corporation engaged in the transportation of property by motor vehicle as a common carrier, both in interstate and intrastate commerce. It operates 1929 motor vehicles, employs 2059 persons, of whom 736 are utilized in its Illinois operations, and maintains terminals at thirty-five cities in eight States. It conducts interstate operations in ten States, including Illinois, under a certificate of public convenience and necessity issued to it by the Interstate Commerce Commission. It also operates in intrastate commerce within Illinois as a line-haul carrier, pursuant to a certificate of public convenience and necessity issued by the Division of Motor Carriers of the Department of Public Works and Buildings.

It is also alleged that during the time covered by the complaint in the suspension proceeding, plaintiff's vehicles [fol. 73] operated approximately 60,000 vehicle trips over the highways of the State, traveling a total of 90,000,000 miles, and transporting daily 7,500,000 pounds of property, and that only two of the 157 violations charged involved

"gross" overloads, as distinguished from "axle" overloads resulting from the shift of cargo during the course of operation of the vehicles.

Plaintiff further alleges that its business as a common carrier constitutes a valuable property right which requires, for its continuous existence, that a regular and uninterrupted service both in interstate and in intrastate commerce be performed, and that a suspension of its service for either ninety days or one year may result in financial ruin.

Section 132.02 alone is attacked here. Plaintiff concedes the validity of section 131, and of section 132.01 (Ill. Rev. Stat. 1951, chap. 95½, par. 229a,) which provides a schedule of fines, graduated according to the amount of excess weight, for violation of section 131.

Subsection (b) of section 132.02, which was added to the act in 1951, provides that the privilege of a commercial vehicle operator to operate upon the highways shall be suspended when he shall "habitually operate" in violation of the maximum load and weight limits of section 131. The "commercial vehicle operator's privilege" is defined by section 132.02(a)(3) as "the privilege, recognized or conferred by any law of this state, of any person * * * to operate * * * commercial vehicles * * * upon the public highways of this state." Section 132.02(c) provides that upon conviction of any person for a violation of section 131 the arresting officer shall report the circumstances of the arrest to the Director of the Department of Public Safety, who is required to mail a copy of the report to the person in whose name the offending vehicle is registered. Section 132.02(d) provides that the Director of the Department of Public Safety shall notify the Attorney General whenever a total of ten convictions has been entered during any twelve months' period with respect to vehicles operated by any one operator. It then becomes the duty of the Attorney General to bring a proceeding to suspend the operator's privilege. By subsection (e), the circuit courts and the superior court of Cook County are given jurisdiction of suspension proceedings.

Subsection (g) provides that proof of a total of ten or more convictions for violation of section 131 during any twelve months' period by any one operator constitutes [fol. 74] *prima facie* evidence that the operator has habitu-

ally operated in violation of section 131. Subsection (g) further provides that "the court shall not find that a defendant has habitually operated one or more commercial vehicles in violation of Section 131 of this Act unless and until the court shall have considered the evidence to the contrary, if any, offered by the defendant, and such evidence may include, but shall not be limited to, evidence relating to the character and gravity of such violations and the extent of the operations of commercial vehicles by or on behalf of such defendant upon the public highways of this state which did not involve any such violations"

Subsection (i) provides that whenever the court shall find from the evidence that an operator has habitually operated one or more commercial vehicles in violation of section 131, it shall enter an order suspending the operator's privilege for a period of ninety days. If at any time thereafter, in another suspension proceeding, the court shall find that the operator has again habitually operated in violation of section 131, it shall enter a similar order of suspension for a period of one year. An order of suspension is enforceable by contempt proceedings, (subsection (j),) and operation after suspension is a misdemeanor (subsection (l)).

The plaintiff contends that section 132.02 is invalid under the Federal and State constitutions. The Federal grounds relied upon are the due process, equal protection, commerce and supremacy clauses. The State grounds are the due process and separation of powers clauses, and the requirement of section 11 of article II that all penalties be proportioned to the offense. We shall defer consideration of the contentions raised under the commerce and supremacy clauses of the Federal constitution until the other issues have been discussed.

Statutory provisions for suspension or revocation of licenses of all types upon proof of violation of law are so familiar as not to warrant citation. In the motor vehicle field, the Illinois provision for revocation of the ordinary driver's license for specified statutory violations (among them three convictions for violation of speed limits) (Ill. Rev. Stat. 1951, chap. 95½, par. 35j), is typical of provisions which are uniformly regarded as permissible regulations of the use of the highways. (*People* v. *Kobylak*, 383 Ill. 432; *I Re Probasco*, 269 Mich. 453, 257 N. W. 861; *Com-*

monwealth v. *Harris*, 278 Ky. 218, 128 S. W. 2d 579; *La-*
[fol. 75] *Plante* v. *State Board*, 47 R. I. 258, 131 Atl. 641; *Commonwealth* v. *Funk*, 323 Pa. 390, 186 Atl. 65; *Pritchard* v. *Battle*, 178 Va. 455, 17 S. E. 2d 393.) That such provisions generally aim to foster public safety, while the primary bearing, at least, of the present provision is the protection of the highways from abuse by excessively heavy loads, cannot be a material difference. Plaintiff would also distinguish these cases on the ground that the suspension here "is directed precisely to a prohibition upon the right to engage in a lawful business." But one who uses the public highways for the conduct of his business certainly cannot on that account claim a preferred position. *Bode* v. *Barrett*, 412 Ill. 204; *Weksler* v. *Collins*, 317 Ill. 132.

Plaintiff, however, asserts that that portion of section 132.02(g) which requires the court to consider evidence relating to the character and gravity of the violations and the extent of the operations of the defendant in determining whether there has been habitual operation in violation of the act fails to provide a "reasonable ascertainable standard" and therefore violates both due process and the separation of powers required by article III of the constitution of Illinois. Insofar as the suspension provision is conditioned upon the occurrence of a statutory offense, there is, of course, no question of indefiniteness, for the statutory maximum weight and load limits are expressed in precise units of physical measurement. But it is argued that the terms "character" and "gravity" lack precision, and that they afford no standard by which an operator who has been convicted of a violation of a statutory load limit can tell whether that violation falls "within or without the type of violation for which an operator's privilege may be suspended." As to the factor of "extent of operations," which the plaintiff describes as the "percentage relationship of violations to nonviolations," it is said that no measure is prescribed for either the court "or the operator to adjudge or determine that distinctive percentage which falls within the prohibited category, and that which falls without it." In support of this argument plaintiff relies upon *Connally* v. *General Construction Co.*, 269 U. S. 385; *Small Company* v. *American Sugar Refining Co.*, 267 U. S. 233; *United States* v. *Capital Traction Co.*, 34 App. D. C. 592,

and other cases in which statutes have been invalidated for want of definiteness.

Neither proposition is sound. It may be conceded, as the plaintiff suggests, that the standards provided do not per- [fol. 76] mit an operator to know in advance whether or not his conduct, admittedly in violation of the law, will be determined to warrant a finding that he has habitually operated in violation of the act with resulting suspension. From the point of view of the operator it would obviously be desirable to know the precise conditions under which he may violate the law without incurring the risk of suspension of his license. But the desire of the operator is not equivalent to a command of the constitution. Many years ago it was pointed out that "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree." Mr. Justice Holmes in *Nash* v. *United States*, 229 U.S. 373, 377.

The General Assembly is not required to establish an absolute criterion for the revocation of this privilege. It may concern itself with the quality of the conduct which is the basis of revocation. It might express that concern by attempting to enumerate all the conditions of weather, roads, and loads, and the myriad of transitory circumstances peculiar to the business of the offending carrier or to the offense which might be relevant by way of excuse or justification. But no constitutional provision requires it to do so as long as intelligible standards are established to be applied by the agency to which the determination is committed.

While the standards here fixed are expressed in general terms, they deal unmistakably with the quality of the conduct which is made the basis of suspension of the privilege. They include factors relating to the deliberate, negligent, or excusable quality of the violations which are relied upon as a basis for revocation. In this we see no constitutional defect.

The plaintiff also contends that the determination of whether or not there has been operation in habitual violation, and hence of whether or not the privilege to operate should be suspended, is so inherently an administrative function that it cannot, under article III of the constitu-

tion, be committed to a court. In support of this argument plaintiff relies on *Borreson* v. *Department of Public Welfare*, 368 Ill. 425. The statute in that case required the court, on an appeal from an administrative agency, to determine *de novo* the amount to be paid to aged persons for old-age assistance, and it was held that the function was administrative, and could not validly be committed to a court. The determinations involved in the present case, [fol. 77] however, are of the kind which have traditionally been considered judicial. The application of generalized standards—negligence, malice, fraud, and a host of others—to particular conduct was the routine business of the courts long before administrative agencies, as we know them now, came into existence. The issues in a suspension proceeding bear a marked resemblance to the issues which courts decide daily in the administration, for example, of statutes providing for probation and indeterminate sentences. And since the procedure in suspension proceedings is governed by the Civil Practice Act, and an order of suspension is enforceable by contempt, the analogy to injunction is obvious. We hold, therefore, that section 132.02 does not violate the provisions of article III.

Plaintiff also attacks the provision that proof of ten or more convictions for violation of the load limits within twelve months shall constitute *prima facie* evidence of habitual operation in violation of the act. It is contended that this provision discriminates unreasonably against one who operates numerous vehicles on frequent trips and in favor of one who operates fewer vehicles and less frequently. Because a *prima facie* case of habitual operation in violation of the statute may be established against operators whose ratio of unlawful to lawful operations is substantially different, it is urged that the statute creates a discrimination which is invalid under the equal-protection clause of the fourteenth amendment.

The argument is not impressive. We are aware of no constitutional provision which would invalidate an absolute rule of suspension for specified violations. Provisions for the suspension or revocation of drivers' licenses for specified violations of law are commonplace. And the fact that these provisions do not take into account the number of miles driven by the respective violators has not, so far as

we are aware, been thought to invalidate them. Plaintiff's argument does no more than underscore the wisdom of the authorized inquiry into the circumstances of the violations, an inquiry which the plaintiff elsewhere in its argument so vigorously attacks.

Plaintiff next argues that the *prima facie* test violates due process because an operator may be faced with the burden of defending against a succession of suspension proceedings involving identical violations. It is suggested that an operator who has ten or more violations during a twelve-month period may be found, in view of all the circum- [fol. 78] stances, not to have operated in habitual violation of the law. Upon further convictions for violation of the load limits during the same twelve-month period, a second action under section 132.02 might be instituted and might result in the suspension of such an operator's privilege. The second suspension proceeding is occasioned, however, by the operator's continued conduct, which results in additional violations. Since these additional convictions tend to cast new light on the overall character of his operations, a re-examination of the charge of habitual violation is justified, and in such a re-examination there is no deprivation of due process.

It is also contended that the statute is fatally unreasonable in that it permits inclusion, in the ten offenses which make up a *prima facie* case, of violations due to "axle overloads," which may have been unavoidable. The argument is based upon the fact that section 131 recognizes a category of "unavoidable" axle overloads which are punished by a nominal fine of one dollar. Apart from the fact that the complaint does not allege that any of the violations with which plaintiff is charged are of this character, the contention must fail. There is no basis for assuming that any court would refuse, in a suspension proceeding, to take into account a previous judicial determination that abnormal and unanticipated conditions made it impossible to prevent undue shifting of a particular load. Indeed, such a circumstance would seem to be peculiarly within the authorized scope of inquiry into the "character" of the violation.

It is said that the penalty of suspension of operating privileges is so disproportionate to the offense as to deprive the plaintiff of due process of law and to contravene sec-

tion 11 of article II of the constitution of Illinois which provides: "All penalties shall be proportioned to the nature of the offense * *." We do not agree. The State's continuing search for effective enforcement techniques to secure compliance with valid weight limits is apparent in the legislation dealing with the subject. (See: Act of July 9, 1935, secs. 132, 135, 137, Laws of 1935, p. 1281 ff.; Act of August 6, 1949, secs. 1, 2, 3, Laws of 1949, p. 1142; Act of August 10, 1949, secs. 132, 132.01, Laws of 1949, p. 1156; Act of August 6, 1951, sec. 132.01, Laws of 1951, p. 2090.) The General Assembly might infer that the truckers find the payment of statutory penalties when violation is established to be economically preferable to compliance. But the State is entitled to insist upon compliance [fol. 79] with its valid regulations, and to shape is penalties to that end. Considerations stemming from the commerce clause of the Federal constitution apart, we see no reason why the State may not restrict the privilege of using its highways for profit to those who comply with its laws. If, because of the peculiarities of a particular load, compliance would present inordinate difficulties, provision is made for a permit to exceed the statutory limits. Ill. Rev. Stat. 1951, chap. 95½, par. 230.

We think the sanction imposed here is not disproportionate to the offense. We have previously sustained acts which impose analogous auxiliary penalties such as the confiscation of a vehicle or prohibition of the use of a building, (*People* v. *Kawoleski*, 310 Ill. 498,) as well as acts imposing progressively severer penalties for repeated offenses. (*Kelly* v. *People*, 115 Ill. 583). *Chicago and Alton Railroad Co.* v. *People ex rel. Koerner*, 67 Ill. 11, on which plaintiff relies, is not authority to the contrary, for we recognized there the propriety of forfeiture in cases of successive violations.

Plaintiff's final contention is that the suspension provisions are invalid under the commerce clause and the supremacy clause of the Federal constitution. While it is conceded that the State has broad powers over the use of its highways in interstate commerce, it is argued that the power of the State does not include the suspension, even for a limited period of time, of the right to engage in interstate commerce, in the case of carriers who hold

certificates of convenience and necessity under the Federal Motor Carrier Act. Because the issue presented lies within a sensitive area of State and Federal relations, we have carefully examined the statute to be sure that it was intended to apply to interstate commerce. Its scope is fixed by the definition of "commercial vehicle operator's privilege" as "the privilege recognized or conferred by any law of this state * * * to operate * * * commercial vehicles * * * upon the public highways of this state." A privilege or right to operate motor vehicles for commercial purposes in interstate commerce is clearly recognized in other statutes. (Ill. Rev. Stat. 1951, chap. 95½, par. 220.13, par. 243.) From this fact, and from the fact that section 132.02 itself does not itself suggest any exemption of operators engaged in interstate commerce, we conclude that the suspension procedure was intended to apply to all [fol. 80] operators whether engaged in interstate or intrastate commerce.

So construing the statute, we meet the contention that the commerce and supremacy clauses of the Federal constitution prevent the State from suspending the right to use its highways in the case of an interstate trucker who operates pursuant to a certificate of convenience and necessity from the Interstate Commerce Commission. On this issue, we find no controlling authority which is precisely in point.

The power of the State over those who use its highways in interstate commerce is extensive. It may prescribe the maximum size and weight of vehicles engaged in interstate commerce, (*South Carolina State Highway Dept.* v. *Barnwell Bros.* 303 U.S. 177), it may regulate their design, (*Maurer* v. *Hamilton*, 309 U.S. 598,) and it may impose nondiscriminatory fees. (*Hendrick* v. *Maryland*, 235 U.S. 610; *Kane* v. *New Jersey*, 242 U.S. 160.) Before Federal regulation of interstate motor carriers became effective, the power of the States to suspend or revoke authority to engage in interstate commerce, as a sanction for the enforcement of State statutes regulating the use of the highways, was sustained. (*Welch Co.* v. *New Hampshire*, 306 U.S. 79; *Eichholz* v. *Public Service Com.* 306 U.S. 268; cf. *Detroit-Cincinnati Coach Line* v. *Public Utilities Com.* 119 Ohio St. 324, 164 N.E. 356.) More recently, State

statutes which provided for revocation as a means of enforcing the collection of taxes have been sustained without discussion of the propriety of the sanction. (*Aero Mayflower Transit Co.* v. *Board of Railroad Comrs.* 332 U.S. 495; *Capital Greyhound Lines* v. *Brice*, 339 U.S. 542.) In *Joyner* v. *Matthews*, 193 Va. 10, 68 S.E. 2d 127, the Virginia court upheld a statute which provided for suspension of the right to operate in interstate commerce for failure to pay amounts which had become due to the State by reason of violations of weight limits. The court noted, however, that suspension was there employed merely as a means of enforcing the payment of amounts due, saying, "So long as the violation is paid for at the rate fixed * * * he can continue to operate." 193 Va. at p. 15.

On the other hand, sanctions of the type here involved have frequently been invalidated under the commerce clause, even though the regulation to which the sanction attached was within the power of the State. So it has been held that payment of a tax otherwise valid may not be made a condition precedent to the right to carry on interstate business, [fol. 81] but that enforcement must be left to ordinary collection procedures. (*Western Union Telegraph Co.* v. *Massachusetts*, 125 U.S. 530.) Nor may nonpayment of an otherwise valid tax be made the basis of the forfeiture of a corporate franchise to engage in interstate commerce. (*St. Louis Southwestern Railway Co.* v. *Arkansas*, 235 U.S. 350.) In *Hill* v. *Florida*, 325 U.S. 538, a union business agent who failed to secure a license required by State law was enjoined from acting as a business agent. The court held that his right to act in that capacity was conferred by the National Labor Relations Act, and that the right so granted could not be obstructed by injunction or by penalty for acting without a license. "It is the sanction here imposed, and not the duty to report, which brings about a situation inconsistent with the federally protected process of collective bargaining." 325 U.S. 538, 543.

Both *Welch Co.* v. *New Hampshire*, 306 U.S. 79, and *Eichholz* v. *Public Service Com.* 306 U.S. 268, which, as noted, sustained sanctions by way of suspension or revocation in the field of highway regulation, strongly suggested that this power of the State would be superseded when the Federal Motor Vehicle Act became effective. (306 U.S. at

pp. 84 and 273.) The Supreme Court of Texas, in *Railroad Commission of Texas* v. *Querner*, 150 Tex. 490, 242 S.W. 2d 166, held that since control over this aspect of interstate commerce has been asserted by the Federal Motor Carrier Act, the sanction of revocation can not be applied to an interstate trucker for violation of a valid State statute, although the opinion intimates that a different rule might be applied if the violation related to public safety or damage to the highways.

None of these determinations appears to us to be conclusive. It is true that the statute here involved applies without discrimination to interstate and intrastate carriers, and that the conduct with which it is concerned, the regulation of load limits upon the highways, is a matter of vital local concern and one which Congress has left open to regulation by the States. On the other hand, Congress has legislated in this field "to the end of developing, coordinating and preserving a national transportation system of water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense." 54 Stat. 899, 49 U.S.C., note preceding sec. 301.

[fol. 82] Weighing the effect of the State action in this case against the announced purpose of Congress, we are of the opinion that the statute is invalid to the extent that it provides for suspension of the right to engage in interstate commerce upon the highways of the State. In the interest of establishing a national transportation system, the Federal government has granted the plaintiff the right to engage in commerce upon the highways of Illinois. That is the very right which is to be suspended under section 132.02. A Federal certificate of convenience and necessity to engage in interstate commerce does not, of course, imply immunity from the payment of taxes and other valid financial obligations. And so it may be that suspension for failure to meet obligations of that kind stands upon a different footing. But we do not see how an adequate national transportation system can be maintained if the comprehensive transportation network which it contemplates is to be subject to disruption by State suspension of operating rights for violation of load limits or other traffic regulations.

The fact that the federally granted right of an operator to engage in interstate commerce cannot be suspended does not, however, impair the validity of section 132.02 as applied to intrastate operations. The continuing power of the State over those operations is expressly recognized by Congress. (49 U.S.C. sec. 302(b).) The statute can operate effectively if its application is restricted to intrastate commerce. And even apart from the separability clause of the statute, (Ill. Rev. Stat. 1951, chap. 95½, par. 239,) section 132.02 itself indicates the intention of the General Assembly to exert the full measure of its constitutional power to secure compliance with its valid regulations.

It follows that the decree of the circuit court must be reversed, and the cause remanded, with directions to enter a decree in accordance with this opinion.

Reversed and remanded, with directions.

[1ols. 83-84] IN SUPREME COURT OF ILLINOIS

No. 32855

HAYES FREIGHT LINES, INC., Appellant

vs.

LATHAM CASTLE, Attorney General of the State of Illinois, and BASIL WILSON, State's Attorney of Marion County, Illinois, Appellees

JUDGMENT—January 20, 1954

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises, are of the opinion that in the record and proceedings aforesaid, and in the rendition of the decree aforesaid, there is manifest error

Therefore, it is considered by the Court that for that

error and others in the record and proceedings aforesaid the decree of the Circuit Court of Marion County in this behalf rendered, Be Reversed, Annulled, set aside and wholly for nothing esteemed, and this cause be remanded to the Circuit Court of Marion County with directions to enter a decree in accordance with the views expressed in the opinion attached to this mandate.

[fol. 85] In the Supreme Court of the State of Illinois

[Title omitted]

Order Staying Mandate—January 25, 1954

This matter coming on to be heard on motion of the defendants-appellees appearing by Latham Castle, Attorney General of the State of Illinois, and upon notice to counsel for the plaintiff-appellant, it is hereby ordered that the mandate of this court in the above entitled matter be stayed, pursuant to Title 28, section 2101 (f) United States Code, for a period of ninety days or until the Supreme Court of the United States has finally disposed of any petition or petitions for certiorari filed in said court or until further order of this court or a justice thereof.

(S.) Walter V. Schaefer, Chief Justice Supreme Court, State of Illinois.

Entered: In Chambers, January 25, 1954.

[fol. 86] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 87] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. 697

LATHAM CASTLE, Attorney General of the State of Illinois, et al., Petitioners,

vs.

HAYES FREIGHT LINES, INC.

ORDER ALLOWING CERTIORARI—Filed June 7, 1954

The petition herein for a writ of certiorari to the Supreme Court of the State of Illinois is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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Supreme Court, U. S.
FILED
APR 19 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. [redacted] 44

LATHAM CASTLE, ATTORNEY GENERAL OF THE STATE OF ILLINOIS, AND BASIL WILSON, STATE'S ATTORNEY OF MARION COUNTY, ILLINOIS,

Petitioners,

vs.

HAYES FREIGHT LINES, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS AND BRIEF IN SUPPORT OF PETITION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. _____

LATHAM CASTLE, ATTORNEY GENERAL OF THE STATE OF ILLINOIS, AND BASIL WILSON, STATE'S ATTORNEY OF MARION COUNTY, ILLINOIS,

Petitioners,

vs.

HAYES FREIGHT LINES, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS AND BRIEF IN SUPPORT OF PETITION.

PETITION FOR CERTIORARI.

The Supreme Court of Illinois, deciding a question which, in the language of that Court's opinion,

> "lies within a sensitive area of State and Federal relations",

has held valid in general an Illinois statute authorizing the suspension of motor truckers' permits to use Illinois highways for habitual violations of provisions fixing maximum weights of truck and load but has held that application of that statute to carriers holding certificates under the Federal Motor Carriers' Act (49 U. S. C., secs. 301

et seq.) would be unconstitutional as insubordinate to the Commerce (Article I, Section 8) and Supremacy Clauses (Article VI, Paragraph 2) of the Federal Constitution.

In short, the Illinois Supreme Court decision declares that the Federal Motor Carriers' Act evinces such congressional "preemption of the field" of interstate traffic under the Motor Vehicle Carriers Act as to bar a State from the exertion of its police power by the suspension of State permits of interstate carriers holding certificates under that Act for habitually contributing to the destruction of those highways which are necessary not only for intrastate commerce but for the very interstate commerce which the Motor Vehicle Carriers Act is intended to regulate.

We are informally advised by counsel for respondent that the Acting Chief Justice of the Supreme Court of Illinois has allowed respondent an appeal from so much of that court's decision as holds the act valid in its application to (1) all intrastate commerce and (2) all interstate traffic save that of holders of certificates under the Motor Carriers Act. This Petition and Brief in support thereof do not deal with respondent's appeal.

SUMMARY OF THE MATTER INVOLVED

The State and Federal Statutes Held by the Illinois Supreme Court To Be in Conflict.

The State statute involved is section 132.02 of the Illinois enactment of the "Uniform Act regulating traffic on the highways" (Ill. Rev. Stat., 1953, Ch. 95½, par. 229 (b), Vol. II, p. 257). The Federal Act with which the State statute has been held to be in conflict is the Federal Motor Carriers' Act, also known as Part II of the Interstate Commerce Act (49 U. S. C., secs. 301 *et seq.*).

The provisions of the Illinois Motor Carriers Act in question are set forth in Appendix I to this Petition immediately following the Brief in Support Thereof. (p. 15.)

The Illinois Supreme Court's opinion in this case thus summarizes the immediately exigent provisions of the statute:

> "Subsection (g) provides that proof of a total of ten or more convictions for violation of section 131 during any twelve months' period by any one operator constitutes *prima facie* evidence that the operator has habitually operated in violation of section 131. Subsection (g) further provides that 'the court shall not find that a defendant has habitually operated one or more commercial vehicles in violation of Section 131 of this Act unless and until the court shall have considered the evidence to the contrary, if any, offered by the defendant, and such evidence may include, but shall not be limited to, evidence relating to the character and gravity of such violations and the extent of the operations of commercial vehicles by or on behalf of such defendant upon the public highways of this state which did not involve any such violations.'
>
> "Subsection (i) provides that whenever the court shall find from the evidence that an operator has habitually operated one or more commercial vehicles in violation of section 131, it shall enter an order suspend-

ing the operator's privilege for a period of ninety days. If at any time thereafter, in another suspension proceeding, the court shall find that the operator has again habitually operated in violation of section 131, it shall enter a similar order of suspension for a period of one year. An order of suspension is enforceable by contempt proceedings (subsection (j)), and operation after suspension is a misdemeanor (subsection (l))."

Respondent is a motor carrier engaging in both intrastate and interstate commerce. It holds a certificate of public convenience and necessity under the Federal Motor Carriers Act. It has been charged with 157 violations of the Illinois statute and alleges on information and belief that 144 additional violations will be charged unless the Act is denounced as unconstitutional. The proceeding in the Illinois courts was one for declaratory judgment that the Illinois statute was unconstitutional. The State remedy thus invoked is appropriate if the State act is unconstitutional. (*Illinois Supreme Court's Opinion*, Appendix II, p. 18.)

The Illinois Supreme Court's first opinion held the Illinois Act valid in general but invalid as to carriers holding permits under the Motor Vehicle Carriers Act. That opinion was withdrawn and rehearing was granted because of the importance of the question and dubiety as to the proper solution of the problem. But on rehearing the court has adhered to its original holding in its presently standing opinion.

THE QUESTION PRESENTED

The question presented is:

AN ILLINOIS STATUTE, HELD CONSTITUTIONAL IN GENERAL AS TO BOTH INTRASTATE AND INTERSTATE MOTOR TRUCKERS, AUTHORIZES THE SUSPENSION OF THE RIGHT TO OPERATE UPON ILLINOIS HIGHWAYS FOR HABITUAL VIOLATIONS OF THAT STATE'S STATUTE FIXING MAXIMUM PERMISSIBLE WEIGHTS OF MOTOR TRUCKS TRAVELING UPON ILLINOIS HIGHWAYS. MAY THE SANCTION OF SUCH REVOCATION BE APPLIED TO TRUCKERS HOLDING CERTIFICATES OF CONVENIENCE AND NECESSITY UNDER THE FEDERAL MOTOR CARRIERS ACT?

REASONS RELIED ON FOR THE GRANTING OF THE WRIT

If the question stated above is not authoritatively answered by the logic of this Court's most nearly applicable decisions (*Welch* v. *New Hampshire*, 306 U. S. 79, *Maurer* v. *Hamilton*, 309 U. S. 598, and *South Carolina* v. *Barnwell Bros.*, 303 U. S. 177), it is a question of first impression in this Court and of the utmost importance, not only to Illinois, but to every State in the Union, which this Court should decide.

If, as we contend, the *rationale* of the decisions cited above is controlling in this case, then the Illinois Supreme Court's decision is in conflict with the decisions in those cases.

The effect of the Illinois Supreme Court's decision is to deny to Illinois protection of the very highways whose existence in good repair is necessary for the very commerce which it was the purpose of the Federal legislation to promote.

Such a denial should not be effective without this Court's approbation upon full consideration of this important question.

PRAYER FOR CERTIORARI.

WHEREFORE, petitioners, the Attorney General of Illinois and the State's Attorney of the county of original venue of this case, pray this Court's writ of *certiorari* to the Illinois Supreme Court to review that court's decision in this case.

Respectfully submitted,

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BRIEF IN SUPPORT OF THE PETITION.

Opinion Below.

The opinion below is reported in 2 Ill. (2d) 58 and is reprinted in full as Appendix II to this Petition and is reproduced in full in the Record. At the time of the writing of this brief, we have not received the printed transcript and consequently it is impossible to refer to the Record pages in this brief.

Jurisdiction.

Jurisdiction of this Court is invoked under Title 28, U. S. C. section 2101 (f). Judgment of the Supreme Court of Illinois was entered on January 20, 1954. This petition is filed within ninety days of said judgment.

Reference to the Petition, Statement of the Case and Statement of the Question Presented.

The case has been stated and the question presented has been delineated in the Petition for Writ of *Certiorari, ante.* We respectfully refer to that Petition for a statement of the case and of the question presented.

SUMMARY OF ARGUMENT.

I.

The Supreme Court of Illinois Erred in Declaring That Holders of Certificates Under the Motor Vehicle Carriers Act Were Immune to the Sanction of the State Act in Question.

A.

The Commerce Clause Does Not Empower Congress in Effect to Expropriate State Highways by Immunizing Interstate Carriers from Otherwise Constitutional Regulations Intended for the Preservation of the Highways Upon Which Interstate Commerce Depends.

B.

Even If Congress Possesses the Power to Authorize the Destruction of State Highways, the Exertion of That Power Should Not be Inferred in the Present Case.

C.

In the Absence of the Existence and Exercise of Congressional Power to Immunize Interstate Carriers from the Act in Question, It is Valid in Its Application to Such Carriers.

II.

This Case Is of Sufficient Moment to Elicit Certiorari.

ARGUMENT.

I.

The Supreme Court of Illinois Erred in Declaring That Holders of Certificates Under the Motor Vehicle Carriers Act Were Immune to the Sanction of the State Act in Question.

A.

The Commerce Clause Does Not Empower Congress in Effect to Expropriate State Highways by Immunizing Interstate Carriers from Otherwise Constitutional Regulations Intended for the Preservation of the Highways Upon Which Interstate Commerce Depends.

This Court has never held that Congress has the power to expropriate without providing or commanding compensation for the highways or other property of a State.

Whatever may be the authority of Congress to supersede state safety and other police regulations in the interest of "commerce among the several States", this Court has never declared that the Congress may in effect commandeer and destroy, either directly or by authorizing such commandeering and destruction by others, property purchased, improved and maintained at State expense.

In *Welch Co.* v. *New Hampshire*, 306 U. S. 79, a unanimous Court said at page 84:

> "The roads belong to the State."

In *Maurer* v. *Hamilton*, 309 U. S. 598, this Court quoted (we do not suggest that it adopted) language from Coordinator Eastman's testimony before the Senate Committee on Interstate Commerce, given in Congressional hearings antecedent to the enactment of the Motor Vehicle Act, in

which he declared (309 U. S. 608) that there was "involved * * * a question * * * as to how far the federal government has power to interfere with the exercise of the police power of the states with respect to the use of their highways."

We submit that with respect to highways owned and maintained by the State as distinct from privately owned railroad lines, wharves, airports and other proprietary arteries or facilities of interstate traffic, the question is not merely one of police power but of preemption in all but name of the State's property.

The State of Illinois has built and owns these highways as surely as she has built and owns her State capitol building. We submit that, save in the exercise of the war power, Congress may neither command nor authorize the destruction of State property either by sudden demolition or the attrition of the slower but continuous and equally certain destruction due to trucks overloaded for gain.

B.

Even If Congress Possesses the Power to Authorize the Destruction of State Highways, the Exertion of That Power Should Not Be Inferred in the Present Case

If we assume without conceding that Congress by setting up a process of certificating motor carriers in interstate commerce had the power to permit the destruction of State highways by overloaded trucks, Congress has not yet sought to assert such power. On the contrary the Federal Motor Carriers Act itself provides that the certificate of convenience and necessity such as was issued to respondent here does not confer "any proprietary rights in the use of the public highways." (49 U. S. C., sec. 307 (b).) As has been pointed out repeatedly by this Court, Congress has not undertaken to regulate the size and weight of

vehicles. (See *Maurer* v. *Hamilton*, 309 U. S. 598.) In that case, the Court pointed out that Congressional intention to displace local laws in the exercise of the commerce power is not to be inferred unless clearly indicated by considerations that are persuasive of the statutory purpose. The Court in *Maurer* v. *Hamilton*, *supra* (at p. 614), pointed out that "the hesitancy manifested by Congress" to interfere in any measure with State regulation clearly indicated that there should be no interference of Congressional intention to regulate traffic upon the highways except to the extent expressly declared.

As the Court pointed out at page 617:

> "Reading the words of § 225 in the light of its legislative history, and mindful of the peculiar conditions of the traffic and the problems of state regulation to which the section must be applied, and of its obvious purpose to postpone until the report of the Commission determination of the extent to which Congress should withdraw from the states their power to regulate sizes and weight of motor vehicles, we cannot say that the phrase as used in the statute is restricted to overall measurements or gross weight, or that it does not include particular dimensions of motor vehicles and their loads and the distribution of load, which affect safety as well as the wear and tear of the highways. We conclude that the Pennsylvania statute now before us is a weight and size regulation within the meaning of § 225, and is within the regulatory authority of the state reserved by that section from the authority granted to the Commission by § 204."

The learned Court below implies that the certificates under the 1935 Act granted rights that did not exist. That is the converse of the fact with exceptions not here necessary to discuss. Prior to the enactment of the Federal Motor Carriers Act in 1935, every person, so far as the Federal government was concerned, had the right to en-

gage in interstate commerce by truck. By its enactment in 1935 of the Federal act, Congress conferred no rights but rather deprived all persons of the right to carry goods for hire in interstate commerce unless certified by the Interstate Commerce Commission. (See *Thomas* v. *McDonald*, 5 Cir., 95 F. (2d) 937, 943.) The conflict, if any, between State and Federal regulation of interstate commerce by motor carrier existed prior to the 1935 Act. The limitation upon State rights to interfere with interstate commerce by truck and the power of the Federal government to protect those engaged in interstate commerce by truck were clearly spelled out in *Buck* v. *Kuykendall*, 267 U. S. 307, *Bush Co.* v. *Malloy*, 267 U. S. 317, and *Bradley* v. *Public Utilities Commission of Ohio*, 289 U. S. 92, 95.

In the first two of the above cited cases, this Court properly held that a state regulatory body could not deny a carrier in interstate commerce the right to use the highways on an economic basis.

In the third case, the *Bradley* case, this Court clearly distinguished the first two cases and pointed out that the Ohio Utilities Commission properly denied Bradley the right to use Ohio roads where it found that the road was congested to such an extent that Bradley would create an undue traffic hazard.

The same issue is here presently, namely, the right of a State to protect its highways as against the duty of Congress to encourage "commerce among the several States". The *rationale* of the cases determined prior to 1935 makes it clear that so long as the State is protecting its highways by regulations which do not discriminate between intrastate and interstate commerce, such regulations, if otherwise valid, may be enforced and that the fact that interstate commerce is disturbed by such enforcement is but an incident to that enforcement and not an objection to it.

As we have pointed out, the 1935 Act did not manifest Congressional intent to regulate the size and weight of vehicles upon the highways.

At once the most vivid illustrations and a conclusive vindication of our point is that Illinois could *imprison* an individual trucker, intrastate or interstate, for overloading her highways. Such incarceration would very effectively prevent the driver from engaging in interstate commerce either with or without any Federal permit, license or certificate. The purely economic sanction of suspension is a far milder measure than imprisonment.

C.

In the Absence of the Existence and Exercise of Congressional Power to Immunize Interstate Carriers from the Act in Question, It Is Valid in Its Application to Such Carriers.

If the Court agrees with us that Congress either lacks the power to interdict the State regulation involved here (Point I-A, *ante*) or although possessing that power, has not exercised it (Point I-B, *ante*), it follows from this Court's decision in *Welch Co.* v. *New Hampshire*, 306 U. S. 79, that the Illinois statute involved is applicable to all interstate carriers. In the *Welch* case the Court upheld the suspension of the privilege of using State highways as to an interstate carrier whose violations occurred after the effective date of the Act and before the Interstate Commerce Commission issued its regulation.

II.

This Case Is of Sufficient Moment to Elicit Certiorari.

In the Petition, *ante*, we have emphasized the great moment of this case, not only to Illinois, but to every State in the Union.

The Illinois Supreme Court has held that Congress has and intended to exercise the power, not only to compromise Illinois' and all other States' police power, but to authorize the expropriation by destruction of the States' highways by the *fiat* of a certificate of convenience and necessity under the Motor Vehicle Carriers Act.

Such a holding should evoke this Court's writ of *certiorari*.

Respectfully submitted,

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APPENDIX I.

"Uniform Act regulating traffic on the highways" (Ill. Rev. Stat., 1953, Ch. 95½, par. 229 (b), (g), (i), (j), and (l), Vol. 2, pp. 257-259) (also known as Illinois Motor Carriers' Act):

(b) The commercial vehicle operator's privilege of any commercial vehicle operator shall be suspended as hereinafter provided, when such commercial vehicle operator shall habitually operate one or more commercial vehicles in violation of section 131 of this Act.

* * * * *

(g) The provisions of an Act of the General Assembly entitled, "An Act in Relation to Practice and Procedure in The Courts of This State," approved June 23, 1933, and all existing and future amendments of said Act and modifications thereof, and the rules now or hereafter adopted pursuant to said Act, shall apply to all proceedings hereunder, except as herein otherwise provided or except when inconsistent with the provisions of this Act.

Proof that a total of ten or more convictions for violation of Section 131 of this Act have been entered during any twelve months period with respect to the operation of one or more commercial vehicles by any one commercial vehicle operator, whether operated individually or through agents, servants or employees of such commercial vehicle operator, shall constitute prima facie evidence that such commercial vehicle operator has habitually operated a commercial vehicle or more than one commercial vehicle in violation of Section 131 of this Act. In any proceeding brought under this section, the court shall not find that a defendant has habitually operated one or more commercial vehicles in violation of Section 131 of this Act unless and until the court shall have considered the evidence to the contrary, if any, offered by the

defendant, and such evidence may include, but shall not be limited to, evidence relating to the character and gravity of such violations and the extent of the operations of commercial vehicles by or on behalf of such defendant upon the public highways of this state which did not involve any such violations.

• • • • •

(i) Whenever the court shall find from the evidence that a commercial vehicle operator has habitually operated a commercial vehicle or more than one commercial vehicle in violation of Section 131 of this Act, it shall enter an order suspending the commercial vehicle operator's privilege of such commercial vehicle operator for a period of 90 days. If at any time thereafter in another proceeding brought under this section, the court shall find from the evidence that a commercial vehicle operator has again habitually operated in violation of Section 131 of this Act, it shall enter a similar order of suspension except that the court shall suspend the commercial vehicle operator's privilege of such commercial vehicle operator for a period of one year.

(j) Whenever the court shall enter any order under the provisions of Paragraph (i) of this section, it shall have full and continuing jurisdiction after the entry of such order to enforce any of the provisions thereof by contempt proceedings.

• • • • •

(l) Whenever any commercial vehicle is operated upon the public highways of this state by or on behalf of any person, firm or corporation at a time when the commercial vehicle operator's privilege of such person, firm or corporation is suspended as provided in this Act, the driver of such vehicle shall be deemed guilty of a misdemeanor, the person, firm or corporation on whose behalf such commercial vehicle is operated shall be deemed guilty of a misdemeanor, and all agents, servants, employees or corporate officers of the person, firm or corporation on whose behalf such commercial vehicle is operated who shall have

knowingly caused or permitted such commercial vehicle to be operated shall be deemed guilty of a misdemeanor, and any one or more or all of such persons, firms and corporations may be prosecuted for such violation. Any individual person convicted of such violation shall be punished by imprisonment for not less than 10 days nor more than 90 days and in the discretion of the court, a fine of not more than $500.00. Any corporation convicted of such a violation shall be punished by a fine of not less than $1000.00 nor more than $5000.00.

APPENDIX II.

(No. 32855.—Reversed and remanded. (2 Ill. (2d) 58.))

Hayes Freight Lines, Inc., *Appellant vs.* Latham Castle, Attorney General, et al., *Appellees.*

MR. CHIEF JUSTICE SCHAEFER delivered the opinion of the court:

Section 132.02 of the Uniform Act Regulating Traffic on Highways (Ill. Rev. Stat. 1951, chap. 95½, par. 229b,) provides for suspension of the privilege of operating a commercial vehicle upon the highways when habitual operation in violation of the maximum weight and load limits fixed by section 131 of the act (Ill. Rev. Stat. 1951, chap. 95½, par. 228), is established. Plaintiff filed a complaint in the circuit court of Marion County in which it alleged that an action had been brought in that court charging plaintiff with 157 violations of section 131, and seeking to suspend its commercial operator's privilege for ninety days. On information and belief, plaintiff also alleged that a second such action was about to be instituted to suspend its privilege for either ninety days or one year because of 144 additional violations. Asserting that the suspension provisions violate the State and Federal constitutions in respects which will be discussed, plaintiff sought a declaratory judgment that they are invalid, and an injunction to restrain the defendants, the Attorney General and the State's Attorney of Marion County, from proceeding further against the plaintiff. The circuit court found the suspension provisions valid, granted defendants' motion to dismiss the complaint, and entered an order of dismissal against the plaintiff who appeals directly to this court.

The complaint alleges that the plaintiff is a corporation engaged in the transportation of property by motor vehicle as a common carrier, both in interstate and intrastate commerce. It operates 1929 motor vehicles, employs 2059 persons, of whom 736 are utilized in its Illinois operations, and maintains terminals at thirty-five cities in eight States. It conducts interstate operations in ten States, including Illinois, under a certificate of public convenience and necessity issued to it by the Interstate Commerce Commission. It also operates in intrastate commerce within Illinois as a line-haul carrier, pursuant to a certificate of public convenience and necessity issued by the Division of Motor Carriers of the Department of Public Works and Buildings.

It is also alleged that during the time covered by the complaint in the suspension proceeding, plaintiff's vehicles operated approximately 60,000 vehicle trips over the highways of the State, traveling a total of 90,000,000 miles, and transporting daily 7,500,000 pounds of property, and that only two of the 157 violations charged involved "gross" overloads, as distinguished from "axle" overloads resulting from the shift of cargo during the course of operation of the vehicles.

Plaintiff further alleges that its business as a common carrier constitutes a valuable property right which requires, for its continuous existence, that a regular and uninterrupted service both in interstate and in intrastate commerce be performed, and that a suspension of its service for either ninety days or one year may result in financial ruin.

Section 132.02 alone is attacked here. Plaintiff concedes the validity of section 131, and of section 132.01 (Ill. Rev. Stat. 1951, chap. 95½, par. 229a,) which provides a schedule of fines, graduated according to the amount of excess weight, for violation of section 131.

Subsection (b) of section 132.02, which was added to the act in 1951, provides that the privilege of a commercial vehicle operator to operate upon the highways shall be suspended when he shall "habitually operate" in violation of the maximum load and weight limits of section 131. The "commercial vehicle operator's privilege" is defined by section 132.02(a)(3) as the "privilege, recognized or conferred by any law of this state, of any person * * * to operate * * * commercial vehicles * * * upon the public highways of this state." Section 132.02(c) provides that upon conviction of any person for a violation of section 131 the arresting officer shall report the circumstances of the arrest to the Director of the Department of Public Safety, who is required to mail a copy of the report to the person in whose name the offending vehicle is registered. Section 132.02(d) provides that the Director of the Department of Public Safety shall notify the Attorney General whenever a total of ten convictions has been entered during any twelve months' period with respect to vehicles operated by any one operator. It then becomes the duty of the Attorney General to bring a proceeding to suspend the operator's privilege. By subsection (e), the circuit courts and the superior court of Cook County are given jurisdiction of suspension proceedings.

Subsection (g) provides that proof of a total of ten or more convictions for violation of section 131 during any twelve months' period by any one operator constitutes *prima facie* evidence that the operator has habitually operated in violation of section 131. Subsection (g) further provides that "the court shall not find that a defendant has habitually operated one or more commercial vehicles in violation of Section 131 of this Act unless and until the court shall have considered the evidence to the contrary, if any, offered by the defendant, and such evidence may include, but shall not be limited to, evidence relating to the

character and gravity of such violations and the extent of the operations of commercial vehicles by or on behalf of such defendant upon the public highways of this state which did not involve any such violations."

Subsection (i) provides that whenever the court shall find from the evidence that an operator has habitually operated one or more commercial vehicles in violation of section 131, it shall enter an order suspending the operator's privilege for a period of ninety days. If at any time thereafter, in another suspension proceeding, the court shall find that the operator has again habitually operated in violation of section 131, it shall enter a similar order of suspension for a period of one year. An order of suspension is enforceable by contempt proceedings, (subsection (j),) and operation after suspension is a misdemeanor (subsection (l).)

The plaintiff contends that section 132.02 is invalid under the Federal and State constitutions. The Federal grounds relied upon are the due process, equal protection, commerce and supremacy clauses. The State grounds are the due process and separation of powers clauses, and the requirement of section 11 of article II that all penalties be proportioned to the offense. We shall defer consideration of the contentions raised under the commerce and supremacy clauses of the Federal constitution until the other issues have been discussed.

Statutory provisions for suspension or revocation of licenses of all types upon proof of violation of law are so familiar as not to warrant citation. In the motor vehicle field, the Illinois provision for revocation of the ordinary driver's license for specified statutory violations (among them three convictions for violation of speed limits) (Ill. Rev. Stat. 1951, chap. 95½, par. 35j,) is typical of provisions which are uniformly regarded as permissible regu-

lations of the use of the highways. (*People* v. *Kobylak*, 383 Ill. 432; *In Re Probasco*, 269 Mich. 453, 257 N. W. 861; *Commonwealth* v. *Harris*, 278 Ky. 218, 128 S. W. 2d 579; *LaPlante* v. *State Board*, 47 R. I. 258, 131 Atl. 641; *Commonwealth* v. *Funk*, 323 Pa. 390, 186 Atl. 65; *Prichard* v. *Battle*, 178 Va. 455, 17 S. E. 2d 393.) That such provisions generally aim to foster public safety, while the primary bearing, at least, of the present provision is the protection of the highways from abuse by excessively heavy loads, cannot be a material difference. Plaintiff would also distinguish these cases on the ground that the suspension here "is directed precisely to a prohibition upon the right to engage in a lawful business." But one who uses the public highways for the conduct of his business certainly cannot on that account claim a preferred position. *Bode* v. *Barrett*, 412 Ill. 204; *Weksler* v. *Collins*, 317 Ill. 132.

Plaintiff, however, asserts that that portion of section 132.02(g) which requires the court to consider evidence relating to the character and gravity of the violations and the extent of the operations of the defendant in determining whether there has been habitual operation in violation of the act fails to provide a "reasonable ascertainable standard" and therefore violates both due process and the separation of powers required by article III of the constitution of Illinois. Insofar as the suspension provision is conditioned upon the occurrence of a statutory offense, there is, of course, no question of indefiniteness, for the statutory maximum weight and load limits are expressed in precise units of physical measurement. But it is argued that the terms "character" and "gravity" lack precision, and that they afford no standard by which an operator who has been convicted of a violation of a statutory load limit can tell whether that violation falls "within or without the type of violation for which an operator's privilege may be suspended." As to the factor of "extent of operations,"

which the plaintiff describes as the "percentage relationship of violations to nonviolations," it is said that no measure is prescribed for either the court "or the operator to adjudge or determine that distinctive percentage which falls within the prohibited category, and that which falls without it." In support of this argument plaintiff relies upon *Connally* v. *General Construction Co.*, 269 U. S. 383; *Small Company* v. *American Sugar Refining Co.*, 267 U. S. 233; *United States* v. *Capital Traction Co.*, 34 App. D. C. 592, and other cases in which statutes have been invalidated for want of definiteness.

Neither proposition is sound. It may be conceded, as the plaintiff suggests, that the standards provided do not permit an operator to know in advance whether or not his conduct, admittedly in violation of the law, will be determined to warrant a finding that he has habitually operated in violation of the act with resulting suspension. From the point of view of the operator it would obviously be desirable to know the precise conditions under which he may violate the law without incurring the risk of suspension of his license. But the desire of the operator is not equivalent to a command of the constitution. Many years ago it was pointed out that "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree." Mr. Justice Holmes in *Nash* v. *United States*, 229 U. S. 373, 377.

The General Assembly is not required to establish an absolute criterion for the revocation of this privilege. It may concern itself with the quality of the conduct which is the basis of revocation. It might express that concern by attempting to enumerate all the conditions of weather, roads, and loads, and the myriad of transitory circumstances peculiar to the business of the offending carrier or to the offense which might be relevant by way of excuse or

justification. But no constitutional provision requires it to do so as long as intelligible standards are established to be applied by the agency to which the determination is committed.

While the standards here fixed are expressed in general terms, they deal unmistakably with the quality of the conduct which is made the basis of suspension of the privilege. They include factors relating to the deliberate, negligent, or excusable quality of the violations which are relied upon as a basis for revocation. In this we see no constitutional defect.

The plaintiff also contends that the determination of whether or not there has been operation in habitual violation, and hence of whether or not the privilege to operate should be suspended, is so inherently an administrative function that it cannot, under article III of the constitution, be committed to a court. In support of this argument plaintiff relies on *Borreson* v. *Department of Public Welfare*, 368 Ill. 425. The statute in that case required the court, on an appeal from an administrative agency, to determine *de novo* the amount to be paid to aged persons for old-age assistance, and it was held that the function was administrative, and could not validly be committed to a court. The determinations involved in the present case, however, are of the kind which have traditionally been considered judicial. The application of generalized standards —negligence, malice, fraud, and a host of others—to particular conduct was the routine business of the courts long before administrative agencies, as we know them now, came into existence. The issues in a suspension proceeding bear a marked resemblance to the issues which courts decide daily in the administration, for example, of statutes providing for probation and indeterminate sentences. And since the procedure in suspension proceedings is governed by

the Civil Practice Act, and an order of suspension is enforceable by contempt, the analogy to injunction is obvious. We hold, therefore, that section 132.02 does not violate the provisions of article III.

Plaintiff also attacks the provision that proof of ten or more convictions for violation of the load limits within twelve months shall constitute *prima facie* evidence of habitual operation in violation of the act. It is contended that this provision discriminates unreasonably against one who operates numerous vehicles on frequent trips and in favor of one who operates fewer vehicles and less frequently. Because a *prima facie* case of habitual operation in violation of the statute may be established against operators whose ratio of unlawful to lawful operations is substantially different, it is urged that the statute creates a discrimination which is invalid under the equal-protection clause of the fourteenth amendment.

The argument is not impressive. We are aware of no constitutional provision which would invalidate an absolute rule of suspension for specified violations. Provisions for the suspension or revocation of drivers' licenses for specified violations of law are commonplace. And the fact that these provisions do not take into account the number of miles driven by the respective violators has not, so far as we are aware, been thought to invalidate them. Plaintiff's argument does no more than underscore the wisdom of the authorized inquiry into the circumstances of the violations, an inquiry which the plaintiff elsewhere in its argument so vigorously attacks.

Plaintiff next argues that the *prima facie* test violates due process because an operator may be faced with the burden of defending against a succession of suspension proceedings involving identical violations. It is suggested that an operator who has ten or more violations during a

twelve-month period may be found, in view of all the circumstances, not to have operated in habitual violation of the law. Upon further convictions for violation of the load limits during the same twelve-month period, a second action under section 132.02 might be instituted and might result in the suspension of such an operator's privilege. The second suspension proceeding is occasioned, however, by the operator's continued conduct, which results in additional violations. Since these additional convictions tend to cast new light on the overall character of his operations, a re-examination of the charge of habitual violation is justified, and in such a re-examination there is no deprivation of due process.

It is also contended that the statute is fatally unreasonable in that it permits inclusion, in the ten offenses which make up a *prima facie* case, of violations due to "axle overloads," which may have been unavoidable. The argument is based upon the fact that section 131 recognizes a category of "unavoidable" axle overloads which are punished by a nominal fine of one dollar. Apart from the fact that the complaint does not allege that any of the violations with which plaintiff is charged are of this character, the contention must fail. There is no basis for assuming that any court would refuse, in a suspension proceeding, to take into account a previous judicial determination that abnormal and unanticipated conditions made it impossible to prevent undue shifting of a particular load. Indeed, such a circumstance would seem to be peculiarly within the authorized scope of inquiry into the "character" of the violation.

It is said that the penalty of suspension of operating privileges is so disproportionate to the offense as to deprive the plaintiff of due process of law and to contravene section 11 of article II of the constitution of Illinois which provides: "All penalties shall be proportioned to the nature

of the offense * * *." We do not agree. The State's continuing search for effective enforcement techniques to secure compliance with valid weight limits is apparent in the legislation dealing with the subject. (See: Act of July 9, 1935, secs. 132, 135, 137, Laws of 1935, p. 1281 ff.; Act of August 6, 1949, secs. 1, 2, 3, Laws of 1949, p. 1142; Act of August 10, 1949, secs. 132, 132.01, Laws of 1949, p. 1156; Act of August 6, 1951, sec. 132.01, Laws of 1951, p. 2090.) The General Assembly might infer that the truckers find the payment of statutory penalties when violation is established to be economically preferable to compliance. But the State is entitled to insist upon compliance with its valid regulations, and to shape its penalties to that end. Considerations stemming from the commerce clause of the Federal constitution apart, we see no reason why the State may not restrict the privilege of using its highways for profit to those who comply with its laws. If, because of the peculiarities of a particular load, compliance would present inordinate difficulties, provision is made for a permit to exceed the statutory limits. Ill. Rev. Stat. 1951, chap. 95½, par. 230.

We think the sanction imposed here is not disproportionate to the offense. We have previously sustained acts which impose analogous auxiliary penalties such as the confiscation of a vehicle or prohibition of the use of a building, (*People* v. *Kawoleski*, 310 Ill. 498,) as well as acts imposing progressively severer penalties for repeated offenses. (*Kelly* v. *People*, 115 Ill. 583.) *Chicago and Alton Railroad Co.* v. *People ex rel. Koerner*, 67 Ill. 11, on which plaintiff relies, is not authority to the contrary, for we recognized there the propriety of forfeiture in cases of successive violations.

Plaintiff's final contention is that the suspension provisions are invalid under the commerce clause and the supremacy clause of the Federal constitution. While it is

conceded that the State has broad powers over the use of its highways in interstate commerce, it is argued that the power of the State does not include the suspension, even for a limited period of time, of the right to engage in interstate commerce, in the case of carriers who hold certificates of convenience and necessity under the Federal Motor Carrier Act. Because the issue presented lies within a sensitive area of State and Federal relations, we have carefully examined the statute to be sure that it was intended to apply to interstate commerce. Its scope is fixed by the definition of "commercial vehicle operator's privilege" as "the privilege recognized or conferred by any law of this state * * * to operate * * * commercial vehicles * * * upon the public highways of this state." A privilege or right to operate motor vehicles for commercial purposes in interstate commerce is clearly recognized in other statutes. (Ill. Rev. Stat. 1951, chap. 95½, par. 220.13, par. 243.) From this fact, and from the fact that section 132.02 itself does not itself suggest any exemption of operators engaged in interstate commerce, we conclude that the suspension procedure was intended to apply to all operators whether engaged in interstate or intrastate commerce.

So construing the statute, we meet the contention that the commerce and supremacy clauses of the Federal constitution prevent the State from suspending the right to use its highways in the case of an interstate trucker who operates pursuant to a certificate of convenience and necessity from the Interstate Commerce Commission. On this issue, we find no controlling authority which is precisely in point.

The power of the State over those who use its highways in interstate commerce is extensive. It may prescribe the maximum size and weight of vehicles engaged in interstate commerce, (*South Carolina State Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177,) it may regulate their design,

(*Maurer* v. *Hamilton*, 309 U. S. 598,) and it may impose nondiscriminatory fees. (*Hendrick* v. *Maryland*, 235 U. S. 610; *Kane* v. *New Jersey*, 242 U. S. 160.) Before Federal regulation of interstate motor carriers became effective, the power of the States to suspend or revoke authority to engage in interstate commerce, as a sanction for the enforcement of State statutes regulating the use of the highways, was sustained. (*Welch Co.* v. *New Hampshire*, 306 U. S. 79; *Eichholz* v. *Public Service Com.*, 306 U. S. 268; cf. *Detroit-Cincinnati Coach Line* v. *Public Utilities Com.*, 119 Ohio St. 324, 164 N. E. 356.) More recently, State statutes which provided for revocation as a means of enforcing the collection of taxes have been sustained without discussion of the propriety of the sanction. (*Aero Mayflower Transit Co.* v. *Board of Railroad Comrs.*, 332 U. S. 495; *Capitol Greyhound Lines* v. *Brice*, 339 U. S. 542.) In *Joyner* v. *Matthews*, 193 Va. 10, 68 S. E. 2d 127, the Virginia court upheld a statute which provided for suspension of the right to operate in interstate commerce for failure to pay amounts which had become due to the State by reason of violations of weight limits. The court noted, however, that suspension was there employed merely as a means of enforcing the payment of amounts due, saying, "So long as the violation is paid for at the rate fixed • • • he can continue to operate." 193 Va. at p. 15.

On the other hand, sanctions of the type here involved have frequently been invalidated under the commerce clause, even though the regulation to which the sanction attached was within the power of the State. So it has been held that payment of a tax otherwise valid may not be made a condition precedent to the right to carry on interstate business, but that enforcement must be left to ordinary collection procedures. (*Western Union Telegraph Co.* v. *Massachusetts*, 125 U. S. 530.) Nor may nonpayment of an otherwise valid tax be made the basis of the forfeiture of a

corporate franchise to engage in interstate commerce. (*St. Louis Southwestern Railway Co.* v. *Arkansas*, 235 U. S. 350.) In *Hill* v. *Florida*, 325 U. S. 538, a union business agent who failed to secure a license required by State law was enjoined from acting as a business agent. The court held that his right to act in that capacity was conferred by the National Labor Relations Act, and that the right so granted could not be obstructed by injunction or by penalty for acting without a license. "It is the sanction here imposed, and not the duty to report, which brings about a situation inconsistent with the federally protected process of collective bargaining." 325 U. S. 538, 543.

Both *Welch Co.* v. *New Hampshire*, 306 U. S. 79, and *Eichholz* v. *Public Service Com.*, 306 U. S. 268, which, as noted, sustained sanctions by way of suspension or revocation in the field of highway regulation, strongly suggested that this power of the State would be superseded when the Federal Motor Vehicle Act became effective. (306 U. S. at pp. 84 and 273.) The Supreme Court of Texas, in *Railroad Commission of Texas* v. *Querner*, 150 Tex. 490, 242 S. W. 2d 166, held that since control over this aspect of interstate commerce has been asserted by the Federal Motor Carrier Act, the sanction of revocation can not be applied to an interstate trucker for violation of a valid State statute, although the opinion intimates that a different rule might be applied if the violation related to public safety or damage to the highways.

None of these determinations appears to us to be conclusive. It is true that the statute here involved applies without discrimination to interstate and intrastate carriers, and that the conduct with which it is concerned, the regulation of load limits upon the highways, is a matter of vital local concern and one which Congress has left open to regulation by the States. On the other hand, Congress

has legislated in this field "to the end of developing, coordinating and preserving a national transportation system of water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense." 54 Stat. 899, 49 U. S. C., note preceding sec. 301.

Weighing the effect of the State action in this case against the announced purpose of Congress, we are of the opinion that the statute is invalid to the extent that it provides for suspension of the right to engage in interstate commerce upon the highways of the State. In the interest of establishing a national transportation system, the Federal government has granted the plaintiff the right to engage in commerce upon the highways of Illinois. That is the very right which is to be suspended under section 132.02. A Federal certificate of convenience and necessity to engage in interstate commerce does not, of course, imply immunity from the payment of taxes and other valid financial obligations. And so it may be that suspension for failure to meet obligations of that kind stands upon a different footing. But we do not see how an adequate national transportation system can be maintained if the comprehensive transportation network which it contemplates is to be subject to disruption by State suspension of operating rights for violation of load limits or other traffic regulations.

The fact that the federally granted right of an operator to engage in interstate commerce cannot be suspended does not, however, impair the validity of section 132.02 as applied to intrastate operations. The continuing power of the State over those operations is expressly recognized by Congress. (49 U. S. C. sec. 302(b).) The statute can operate effectively if its application is restricted to intrastate commerce. And even apart from the separability clause of the

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 44

LATHAM CASTLE, ATTORNEY GENERAL OF THE STATE OF ILLINOIS, ET AL.,

Petitioners,

vs.

HAYES FREIGHT LINES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF FOR THE PETITIONERS.

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF FOR THE PETITIONERS.

OPINION BELOW.

The opinion of the Supreme Court of Illinois (R. 50-62) is reported at 2 Ill. 2d, 58 and at 117 N. E. 2d 106.

JURISDICTION.

The judgment of the Supreme Court of Illinois was entered on January 20, 1954. (R. 62.) The petition for certiorari was filed April 19, 1954, and was granted June 7, 1954. Jurisdiction of the court rests upon 28 U. S. C. 2101 (f).

STATUTES INVOLVED.

The Federal Motor Carrier Act of 1935, also known as Part II of the Interstate Commerce Act (49 U. S. C., secs. 301 *et seq.*) and the Illinois Uniform Act Regulating Traffic on the Highways (Ill. Rev. Stats. 1953, ch. 95½, pars. 229 (b), (g), (i), (j), (l); Vol. 2, p. 257) printed herein as Appendix A and Appendix B, are involved.

QUESTION PRESENTED FOR REVIEW.

An Illinois statute, held constitutional in general as to both intrastate and interstate motor truckers, authorizes the suspension of the privilege to operate upon Illinois highways for habitual violations of that state's statute fixing maximum permissible weights of motor trucks traveling upon Illinois highways. May the sanction of such suspension be applied to truckers holding certificates of convenience and necessity under the Federal Motor Carrier Act?

STATEMENT OF THE CASE.

For a long period of time, Illinois has regulated the weight of motor vehicles upon its highways. In force at all times material to this litigation was Section 131 of the Uniform Act Regulating Traffic on the Highways which set maximum weights of vehicles.[1] In 1951 the Illinois General Assembly amended the Uniform Act Regulating Traffic on the Highways by enacting section 132.02 which is here directly involved.[2] The Illinois Supreme Court's opinion summarized the exigent provisions of the statute:

> "Subsection (g) provides that proof of a total of ten or more convictions for violation of section 131

1. Ill. Rev. Stats. 1953, ch. 95½, par. 228, Vol. 2, p. 256.

2. Ill. Rev. Stats. 1953, ch. 95½, par. 229b, Vol. 2, p. 257, Appendix B, pp. 25-27.

during any twelve months' period by any one operator constitutes *prima facie* evidence that the operator has habitually operated in violation of section 131. Subsection (b) further provides that 'the court shall not find that a defendant has habitually operated one or more commercial vehicles in violation of Section 131 of this Act unless and until the court shall have considered the evidence to the contrary, if any, offered by the defendant, and such evidence may include, but shall not be limited to, evidence relating to the character and gravity of such violations and the extent of the operations of commercial vehicles by or on behalf of such defendant upon the public highways of this state which did not involve any such violations.'

"Subsection (i) provides that whenever the court shall find from the evidence that an operator has habitually operated one or more commercial vehicles in violation of Section 131, it shall enter an order suspending the operator's privilege for a period of ninety days. If at any time thereafter, in another suspension proceeding, the court shall find that the operator has again habitually operated in violation of section 131, it shall enter a similar order of suspension for a period of one year. An order of suspension is enforceable by contempt proceedings (subsection (j)), and operation after suspension is a misdemeanor (subsection (l))." (R. 52-53.)[3]

Respondent, hereinafter called Hayes, instituted the action from which the proceedings in this court originated in the circuit court of Marion County, Illinois, against petitioners, Castle, as Attorney General of Illinois, and Wilson, as State's Attorney of Marion County, Illinois. Hayes, a motor carrier engaged in both intrastate and interstate commerce in Illinois, holds a certificate of public convenience and necessity under the Federal Motor

3. *Hayes Freight Lines, Inc.* v. *Castle*, 2 Ill. 2d 58, 62.

Carrier Act.[4] Under the challenged Illinois statute[5], Hayes had been charged with 157 violations of the Illinois weight statute in a proceeding to suspend its privilege of operating in Illinois. Hayes alleged that further proceedings charging 144 additional violations were threatened by petitioners. Hayes asked declaratory judgment that section 132.02[6] was unconstitutional and prayed an injunction restraining petitioners from conducting any suspension proceedings against it. The pleadings asserted violation of both state and federal Constitutions. (R. 1-12.) Petitioners concede that if section 132.02 be unconstitutional, respondent invoked a proper remedy.

On motion of petitioner, the circuit court of Marion County dismissed the complaint of respondent. (R. 13.) On appeal the Supreme Court of Illinois rejected Hayes' contentions *in toto* with one exception: the court determined the challenged suspension section when applied to carriers operating pursuant to certificates of convenience and necessity issued by the Interstate Commerce Commission was in conflict with the Federal Motor Carrier Act and to that extent invalid. (R. 58-62.) Accordingly, it reversed the decree of the circuit court of Marion County with instructions to enter a decree in accordance with the views expressed in the opinion of the court. (R. 63.)

Hayes, respondent in the instant proceedings for certiorari, appealed from the decree of the Supreme Court of Illinois in cause #706 of the October 1953 Term of this Court. That appeal was dismissed on June 7, 1954, by this Court.[7]

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4. 49 U. S. C., secs. 301, *et seq.* (Appendix A, pp. 19-24).

5. Ill. Rev. Stats. 1953, ch. 95½, par. 229b, Vol. 2, p. 257, Appendix B, p. 25.

6. *Ibid.*

7. *Hayes Freight Lines, Inc.* v. *State of Illinois*, ... U. S. ....., 74 S. Ct. 866.

SUMMARY OF ARGUMENT.

The roads of Illinois are the property of that state. The commerce clause does not authorize Congress to permit interstate truckers to operate habitually in violation of the state's regulation relating to size and weight of motor vehicles. Even if Congress has such power it has not exercised that power. Illinois clearly retains it. The fact that suspension of the privilege of operating over the highways of Illinois is a penalty for habitually overloading trucks does not violate any Federal right of a trucker certificated by the Interstate Commerce Commission.

POINTS AND AUTHORITIES.

I.

The Commerce Clause Does Not Empower Congress in Effect to Expropriate State Highways by Immunizing Interstate Carriers from Otherwise Constitutional Regulations Intended for the Preservation of the Highways Upon Which Interstate Commerce Depends.

Welch Co. v. *New Hampshire*, 306 U. S. 79, 84.

Maurer v. *Hamilton*, 309 U. S. 598, 608.

Werner Transport Co. v. *Hughes*, 19 Fed. Supp. 425.

Geer v. *Connecticut*, 161 U. S. 519.

Hudson County Water Co. v. *McCarter*, 209 U. S. 349.

Silz v. *Hesterberg*, 211 U. S. 31.

Bayside Fish Co. v. *Gentry*, 297 U. S. 422.

Henderson Bridge Company v. *Kentucky*, 166 U. S. 150.

Detroit International Bridge Co. v. *Tax Board*, 294 U. S. 83.

49 U. S. C., Secs. 301 *et seq.*

Ill. Rev. Stat. 1953, Ch. 95½, Par. 229b, Vol. 2, p. 257.

II.

Even If Congress Possesses the Power to Regulate Size and Weight of Vehicles on State Highways, It Has Not Done So. Illinois Remains With Complete Power to Regulate Size and Weight of Vehicles Upon Its Highways.

S. C. Hwy. Dept. v. Barnwell Bros., 303 U. S. 177, 187.
Maurer v. Hamilton, 309 U. S. 598, 610.
Bradley v. Pub. Util. Comm'n., 289 U. S. 92.
Buck v. Kuykendall, 267 U. S. 307, 314-315.
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Morris v. Duby, 274 U. S. 135.
Sproles v. Binford, 286 U. S. 374.
49 U. S. C., Sec. 325.

III.

In the Absence of the Existence and Exercise of Congressional Power to Immunize Interstate Carriers from the Act in Question, It Is Valid in Its Application to Such Carriers.

Welch Co. v. New Hampshire, 306 U. S. 79, 84.
Hayes Freight Lines, Inc. v. Castle, 2 Ill. 2d 58, 62, 68-69.
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McDonald v. Thompson, 305 U. S. 263.
Title 49, U. S. C., Sec. 307(b).

ARGUMENT.

I.

The Commerce Clause Does Not Empower Congress in Effect to Expropriate State Highways by Immunizing Interstate Carriers from Otherwise Constitutional Regulations Intended for the Preservation of the Highways Upon Which Interstate Commerce Depends.

In discussing the alleged conflict between the Federal Motor Carrier Act[8] and the suspension clause of the Uniform Act Regulating Traffic On The Highways,[9] the Supreme Court of Illinois said (2 Ill. 2d 58 at p. 73):

> "In the interest of establishing a national transportation system, the Federal government has granted the plaintiff the right to engage in commerce upon the highways of Illinois. That is the very right which is to be suspended under section 132.02. * * * we do not see how an adequate national transportation system can be maintained if the comprehensive transportation network which it contemplates is to be subject to disruption by State suspension of operating rights for violation of load limits or other traffic regulations."

It is respectfully submitted that the learned court below misapprehended the power of the national Congress over the state highways. As this court has pointed out, "The roads belong to the State."[10]

This court has never held the Commerce Clause empowered the Federal government to take over without compen-

8. 49 U. S. C., secs. 301 *et seq.*

9. Ill. Rev. Stats. 1953, ch. 95½, par. 229b, Vol 2, p. 257, Appendix B, p. 25.

10. *Welch Co.* v. *New Hampshire*, 306 U. S. 79, 84.

sation property of the state. On the contrary, it has been held that state property is not subject to the restraints of the Commerce Clause.[11] Further, the building, maintaining and regulating of structures carrying vehicles is not engaging in interstate commerce nor employing property in interstate commerce.[12]

Under the Act in question the State of Illinois is empowered to suspend only an operator who has "habitually operated * * * in violation of" admittedly valid regulations as to weight of motor vehicles.[13]

The Supreme Court of Illinois found that the Act relating to suspension was valid generally; that it violated no constitutional rights guaranteed by the state or United States except as to the "rights" granted under a certificate of convenience and necessity issued by the Interstate Commerce Commission pursuant to the Federal Motor Carrier Act.

The highways of Illinois belong to the state. The net result of the holding of the Supreme Court of Illinois is that notwithstanding the destruction of its property, the state has but limited power to protect that property against the trucker who habitually overloads his vehicle. The holding implies that Congress, without compensation to the State of Illinois, may take the property of Illinois under the Commerce Clause and turn it over to those who for

11. See *Geer* v. *Connecticut*, 161 U. S. 519 (Wild Game); *Hudson County Water Co.* v. *McCarter*, 209 U. S. 349 (Water); *Silz* v. *Hesterberg*, 211 U. S. 31 (Wild Game); *Bayside Fish Co.* v. *Gentry*, 297 U. S. 422 (Fish).

12. *Henderson Bridge Company* v. *Kentucky*, 166 U. S. 150; *Detroit International Bridge Co.* v. *Tax Board*, 294 U. S. 83 (Bridges).

13. Hayes has not challenged the validity of Illinois weight regulation. The Illinois weight regulation has been upheld by a three judge court as not violating rights under the Federal Constitution, nor in conflict with Motor Carriers Act. See *Werner Transport Co.* v. *Hughes*, D. C., Illinois, 19 F. Supp. 425.

gain destroy the very avenues upon which interstate commerce could move.

This court has neither by explicit nor implicit language supported such philosophy. If federal legislation under the Commerce Clause inferentially directs the state to abrogate as to interstate carriers non-discriminatory protective measures relating to its highways, then it follows logically that under the Commerce Clause the Congress can command the states without compensation to open, to alter, or to vacate public roads. The Commerce Clause cannot be so construed.

II.

Even If Congress Possesses the Power to Regulate Size and Weight of Vehicles on State Highways, It Has Not Done So. Illinois Remains With Complete Power to Regulate Size and Weight of Vehicles Upon Its Highways.

Even if this court should assume, without determining that the Commerce Clause of the United States Constitution granted Congress power to regulate size and weight of vehicles upon state-owned highways, it is patent that Congress has not exercised such power. Until Congress exercises such power, equally obvious is the power of the state to regulate the size and weight of vehicles. As this court pointed out in *S. C. Hwy. Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 187:

> "• • • Few subjects of state regulation are so peculiarly of local concern as is the use of state highways. There are few, local regulation of which is so inseparable from a substantial effect on interstate commerce. Unlike the railroads, local highways are *built, owned* and *maintained by the state or its municipal subdivisions*. The state has a primary and immediate concern in their safe and economical administration. The present regulations, or any others of

like purpose, if they are to accomplish their end, must be applied alike to interstate and intrastate traffic both moving in large volume over the highways. The fact that they affect alike shippers in interstate and intrastate commerce in large number within as well as without the state is a safeguard against their abuse.

"From the beginning it has been recognized that a state can, if it sees fit, build and maintain its own highways, canals and railroads and that in the absence of Congressional action their regulation is peculiarly within its competence, even though interstate commerce is materially affected. * * *" (Emphasis supplied.)

It is clear that a state may rightfully prescribe regulations in respect to the operation upon its highway of all motor vehicles so long as the legislation falls uniformly upon commerce, interstate and intrastate.[14]

That the Federal government appropriates money to the states for highway purposes, did not take from the states the power to regulate the use of the highways in order to promote conservation of highways and safety thereon.[15]

This court carefully delineated the constitutionally protected right to engage in interstate commerce in apposition to the state power to protect its highways in the three cases of *Buck* v. *Kuykendall*, 267 U. S. 307, 314-315; *Bush Co.* v. *Maloy*, 267 U. S. 317, 324; and *Bradley* v. *Pub. Utl. Comm'n.*, 289 U. S. 92. In the first two cases the court set aside state orders purporting to regulate motor carriers for hire. In *Buck* v. *Kuykendall*, *supra*, it was said that none has a right to make the highways his "place of business by using them as a common carrier for hire. Such use

14. *Hendrick* v. *Maryland*, 235 U. S. 610, 622 (state statute lawfully requiring registration and fee therefor of motor vehicles); *Kane* v. *New Jersey*, 242 U. S. 160, 167 (licensing of drivers).

15. *Morris* v. *Duby*, 274 U. S. 135 (Regulation by highway commission reducing maximum load held valid); see also *Sprodes* v. *Binford*, 286 U. S. 374.

is a privilege which may be granted or withheld by the State in its discretion * * *." The court further pointed out that state regulation to exclude unnecessary vehicles promotes both safety and economy and is valid even if applied to interstate commerce in the absence of legislation by which Congress "deals specifically with the subject. * * *.", and further "* * * appropriate state regulations adopted primarily to promote safety upon the highways and conservation in their use are not obnoxious to the Commerce Clause, where the indirect burden imposed upon interstate commerce is not unreasonable. * * *"

Buck and *Bush Co.* are clearly explained in *Bradley*. In the former two cases, while safety was promoted when the certificate was denied because intensification of traffic was prevented, the promotion of safety was merely an incident to the denial. The action in the former two cases was unlawful because it was to prevent competition deemed undesirable and since the transportation was interstate, the denial invaded the province of Congress. In *Bradley*, the purpose of the denial was to promote safety and the test employed was congestion on the highway. The effect *of the denial* upon interstate commerce was an incident and not unlawful.[16]

The congressional intent not to regulate size and weights of motor vehicles can be found in section 225 of the Motor Carrier Act.[17] The Commission was authorized merely to investigate and report the need for federal regulation of sizes and weights of motor vehicles.

While appearing before a Congressional Committee, the Federal Coordinator of Transportation testified—

> "* * * with respect to size and weight of vehicles * * * we do not undertake in this bill to cover that situation * * * because there is involved not only a question of fact as to what the regulation should be, *but also as to how far the Federal government has*

16. *Bradley* v. *Pub. Util. Comm'n*, 289 U. S. 92, 95.

17. 49 U. S. C., sec. 325, Appendix A, p. 24

power to interfere with the exercise of police power of the states with respect to their highways. They have the right to protect the highways against unsafe or unreasonable use, but whether or not the Federal government can come in and interfere with it, I cannot say at this time." (Emphasis supplied.)[18]

The decisions of the court as to the power of the state to protect its highways announced prior to 1935 were not changed by the passage of the Motor Carrier Act in 1935. This is clear from the *Barnwell* case.[19] In that case the truckers raised specifically the question of whether the Motor Carrier Act of 1935 superseded state regulation of size and weight of motor vehicles. The three-judge court ruled that weight regulation had not been superseded by that act. This court observed that there was no occasion for saying "the bare possession of power by Congress to regulate the interstate traffic forces the states to conform to standards which Congress might, but has not adopted, or curtails their power to take measures to insure the safety and conservation of their highways which may be applied to like traffic moving intrastate."[20]

In Maurer v. *Hamilton*, this court said: "The power of states to regulate the size and weights of loaded motor vehicles was thus left undisturbed.[21]

The United States has passed no general legislation dealing with size and weights of motor vehicles in interstate commerce, Illinois retains complete power to protect its highways from overloaded vehicles.

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18. *Maurer* v. *Hamilton*, 309 U. S. 598, 608.
19. 303 U. S. 177, 187.
20. *Ibid*, 187.
21. 309 U. S. 598, 610; cf *Ibid*., p. 609, n. 9.

III.

In the Absence of the Existence and Exercise of Congressional Power to Immunize Interstate Carriers from the Act in Question, It Is Valid in Its Application to Such Carriers.

The Federal Motor Carrier Act specifically declares a certificate under the act does not confer "any proprietary rights in the use of public highways * * *."[22]

Notwithstanding the holdings of this court and the clear expression of congressional intent as expressed in 307(b) of 49 U. S. C., respondent persuaded the learned court below that the Federal Motor Carrier Act conferred "rights" upon truckers which had not existed prior to the passage of that act. In its opinion the Supreme Court of Illinois said: "In the interest of establishing a national transportation system the Federal government has granted the plaintiff the right to engage in commerce upon the highways of Illinois."[23]

The statement of the court is based upon a misapprehension of the law. Prior to the passage of the act, the Constitution prohibited the states from regulating interstate commerce by motor carrier on the highways.[24] Congress, except in certain instances not here in point, did not regulate such commerce. Thus, it may well be said that prior to the Motor Carrier Act of 1935, all persons had the right to engage in commerce upon the highway. The result of the act was not to confer a right to engage in interstate commerce. Instead it drastically limited the right of persons to engage in interstate commerce. The act made it

22. 49 U. S. C., sec. 307 (b).

23. *Hayes Freight Lines, Inc.* v. *Castle*, 2 Ill. 2d 58, 73.

24. See *Buck* v. *Kuykendall*, 267 U. S. 307; *Bush Co.* v. *Maloy*, 267 U. S. 317.

unlawful to operate upon the highways as a common carrier in interstate commerce without a certificate from the Interstate Commerce Commission.[25]

The purpose of the act as set forth in the national transportation policy was to provide fair and impartial *regulation* of all modes of transportation.[26] This act to regulate cannot be construed as an act to grant rights.

Hayes has not attacked and (we assume) will concede that the regulation of size and weight of motor vehicles in Illinois rests in the State of Illinois. We submit that there is no authority other than the decision below that would hold that a certificate to engage in interstate commerce as a carrier of goods for hire is a certificate which entitles the holder thereof to violate the laws of the State relating to size and weight of motor vehicles.

We, therefore, reach the question of the propriety of suspending a certificated carrier of goods in interstate commerce for violation of regulation as to size and weight. The sanction of suspension here prescribed by statute does not violate the due process and equal protection clause of the United States Constitution.[27]

In the ultimate analysis the imposition of fines is no deterrent to overloading of motor vehicles. The pecuniary exaction is merely one more cost of doing business passed on to the shipper. The Supreme Court of Illinois said:

> "* * * The State's continuing search for effective enforcement techniques to secure compliance with valid weight limits is apparent in the legislation dealing with the subject. (See: Act of July 9, 1935, secs. 132, 135, 137, Laws of 1935, p. 1281 ff.; Act of August 6, 1949, secs. 1, 2, 3, Laws of 1949, p. 1142; Act of August 10,

25. See *Thompson* v. *McDonald*, 5 Cir., 95 F. 2d 937, 943 (affirmed *McDonald* v. *Thompson*, 305 U. S. 263).

26. Appendix A, p. 19.

27. *Hayes Freight Lines, Inc.* v. *Castle*, 2 Ill. 2d 58, 67, 69.

1949, secs. 132, 132.01, Laws of 1949, p. 1156; Act of August 6, 1951, sec. 132.01, Laws of 1951, p. 2090.) The General Assembly might infer that the truckers find the payment of statutory penalties when violation is established to be economically preferable to compliance. But the State is entitled to insist upon compliance with its valid regulations, and to shape its penalties to that end. Considerations stemming from the commerce clause of the Federal constitution apart, we see no reason why the State may not restrict the privilege of using its highways for profit to those who comply with its laws. If, because of the peculiarities of a particular load, compliance would present inordinate difficulties, provision is made for a permit to exceed the statutory limits. Ill. Rev. Stats. 1951, ch. 95½, par. 230."[28]

This court, by dismissing the appeal of respondent, implicitly found that the remedy of suspension does not deprive Hayes of the right of equal protection or of due process of law under the Federal Constitution.

Most nearly analogous to the present question is the case of *Welch Co.* v. *New Hampshire*, 306 U. S. 79, 84. Welch Co., a Massachusetts corporation, did approximately 1% intrastate and 99% interstate business in New Hampshire. After notice and hearing, the Public Service Commission of New Hampshire suspended registration certificates for violation of a state statute relating to the operation of motor vehicles by drivers who had been continuously on duty for more than twelve hours.

The Federal Motor Carrier Act specifically empowered the Interstate Commerce Commission to establish regulations with respect to hours of service. Violations for which Welch was suspended occurred after the effective date of the Federal act and before the Interstate Commerce Commission made its order. In affirming the judgment of the New Hampshire court which had dismissed the appeal from

28. *Ibid*, pp. 68-69.

the order of the Public Service Commission, this court said: "* * * Congress by mere grant of power to the Interstate Commerce Commission did not intend to supersede state police regulations established for the protection of the public using state highways."

This court can take judicial notice that overloaded trucks will destroy the highways of Illinois. Such trucks are a danger to the life and property of every person upon the highways. Unless and until Congress, pursuant to constitutional power, enacts legislation to the contrary, Illinois may deny the privilege of operating upon its highways those who habitually violate statutes relating to weights of motor vehicles.

CONCLUSION.

In view of the foregoing, we pray that this court will reverse the decision of the Supreme Court of Illinois and remand the cause with instructions to affirm the trial court.

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APPENDIX A.

Excerpts from Federal Motor Carrier Act (49 U. S. C., secs. 301 et seq.).

National Transportation Policy: It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; —all to the end of developing, coordinating and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy. (Historical note preceding sec. 301, Title 49, U. S. C.)

Sec. 302. (a) The provisions of this chapter apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation, and the regulation of such transportation, and of the procurement thereof, and the provision of facilities therefor, is vested in the Interstate Commerce Commission.

(b) Nothing in this chapter shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof.

* * * * *

Sec. 304. (a) Powers and duties generally:

It shall be the duty of the Commission—

(1) To regulate common carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

(2) To regulate contract carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

(3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment. In the event such requirements are established, the term "motor carrier" shall be construed to include private carriers of property by motor vehicle in the administration of subsection (c) of this section and sections 305, 320, 321, 322(a), (b), (d), (f), and (g), and 324 of this title.

(4) To regulate brokers as provided in this chapter,

and to that end the Commission may establish reasonable requirements with respect to licensing, financial responsibility, accounts, records, reports, operations, and practices of any such person or persons.

(4a) To determine, upon its own motion, or upon application by a motor carrier, a State board, or any other party in interest, whether the transportation in interstate or foreign commerce performed by any motor carrier or class of motor carriers lawfully engaged in operation solely within a single State is in fact of such nature, character, or quantity as not substantially to affect or impair uniform regulation by the Commission of transportation by motor carriers engaged in interstate or foreign commerce in effectuating the national transportation policy declared in the Interstate Commerce Act. Upon so finding, the Commission shall issue a certificate of exemption to such motor carrier or class of motor carriers which, during the period such certificate shall remain effective and unrevoked, shall exempt such carrier or class of motor carriers from compliance with the provisions of this chapter, and shall attach to such certificate such reasonable terms and conditions as the public interest may require. At any time after the issuance of any such certificate of exemption, the Commission may by order revoke all or any part thereof, if it shall find that the transportation in interstate or foreign commerce performed by the carrier or class of carriers designated in such certificate shall be, or shall have become, or is reasonably likely to become, of such nature, character, or quantity as in fact substantially to affect or impair uniform regulation by the Commission of interstate or foreign transportation by motor carriers in effectuating the national transportation policy declared in the Interstate Commerce Act. Upon revocation of any such certificate, the Commission shall restore to the carrier or carriers affected thereby, without further proceedings, the authority, if any, to op-

erate in interstate or foreign commerce held by such carrier or carriers at the time the certificate of exemption pertaining to such carrier or carriers became effective. No certificate of exemption shall be denied, and no order of revocation shall be issued, under this subparagraph, except after reasonable opportunity for hearing to interested parties. Where an application is made in good faith for the exemption of a motor carrier under this subparagraph, accompanied by a certificate of a State board of the State in which the operations of such carrier are carried on stating that in the opinion of such board such carrier is entitled to a certificate of exemption under this subparagraph, such carrier shall be exempt from the provisions of this chapter beginning with the sixtieth day following the making of such application to the Commission unless prior to such time the Commission shall have by order denied such application, and such exemption shall be effective until such time as the Commission, after such sixtieth day, may by order deny such application or may by order revoke all or any part thereof as hereinbefore authorized. In any case where a motor carrier has become exempt from the provisions of this chapter as provided in this subparagraph, it shall not be considered to be a burden on interstate or foreign commerce for a State to regulate such carrier with respect to the operations covered by such exemption. Applications under this subparagraph shall be made in writing to the Commission, verified under oath, and shall be in such form and contain such information as the Commission shall by regulations require.

(5) For the purpose of carrying out the provisions pertaining to safety, the Commission may avail itself of the assistance of any of the several research agencies of the Federal Government having special knowledge of any such matter, to conduct such scientific and technical researches, investigations, and tests as may be necessary to

promote the safety of operation and equipment of motor vehicles as provided in this chapter; the Commission may transfer to such agency or agencies such funds as may be necessary and available to make this provision effective.

(6) To administer, execute, and enforce all provisions of this chapter, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration; and

(7) For purposes of the administration of the provisions of this chapter, to inquire into the management of the business of motor carriers and brokers, and into the management of the business of persons controlling, controlled by, or under common control with, motor carriers to the extent that the business of such persons is related to the management of the business of one or more motor carriers, and the Commission shall keep itself informed as to the manner and method in which the same are conducted, and may obtain from such carriers and persons such information as the Commission deems necessary to carry out the provisions of this chapter; and may transmit to Congress from time to time, such recommendations (including recommendations as to additional legislation) as the Commission may deem necessary.

Sec. 306. (1) Except as otherwise provided in this section and in section 310a of this title, no common carrier by motor vehicle subject to the provisions of this chapter shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: * * *

Sec. 307. (b) No certificate issued under this chapter shall confer any proprietary or property rights in the use of the

public highways. Feb. 4, 1887, c. 104, Part II, sec. 207, as added Aug. 9, 1935, c. 498, 49 Stat. 551.

Sec. 325. The Commission is authorized to investigate and report on the need for Federal regulation of the sizes and weight of motor vehicles and combinations of motor vehicles and of the qualifications and maximum hours of service of employees of all motor carriers and private carriers of property by motor vehicle; and in such investigation the Commission shall avail itself of the assistance of all departments or bureaus of the Government and of any organization of motor carriers having special knowledge of any such matter. Feb. 4, 1887, c. 104, Part II, sec. 225, as added August 9, 1935, c. 498, 49 Stat. 566, renumbered sec. 226 by Sept. 18, 1940, c. 722, Title I, Sec. 26 (b), 54 Stat. 929.

APPENDIX B.

Excerpts from section 132.02 of Uniform Act regulating traffic on the highways (Ill. Rev. Stat., 1953, Ch. 95½, par. 229 (b), (g), (i), (j), and (l), Vol. 2, pp. 257-259).

(b) The commercial vehicle operator's privilege of any commercial vehicle operator shall be suspended as hereinafter provided, when such commercial vehicle operator shall habitually operate one or more commercial vehicles in violation of section 131 of this Act.

• • • • •

(g) The provisions of an Act of the General Assembly entitled, 'An Act in Relation to Practice and Procedure in The Courts of This State,' approved June 23, 1933, and all existing and future amendments of said Act and modifications thereof, and the rules now or hereafter adopted pursuant to said Act, shall apply to all proceedings hereunder, except as herein otherwise provided or except when inconsistent with the provisions of this Act.

Proof that a total of ten or more convictions for violation of Section 131 of this Act have been entered during any twelve months period with respect to the operation of one or more commercial vehicles by any one commercial vehicle operator, whether operated individually or through agents, servants or employees of such commercial vehicle operator, shall constitute prima facie evidence that such commercial vehicle operator has habitually operated a commercial vehicle or more than one commercial vehicle in violation of Section 131 of this Act. In any proceeding brought under this section, the court shall not find that a defendant has habitually operated one or more commercial

vehicles in violation of Section 131 of this Act unless and until the court shall have considered the evidence to the contrary, if any, offered by the defendant, and such evidence may include, but shall not be limited to, evidence relating to the character and gravity of such violations and the extent of the operations of commercial vehicles by or on behalf of such defendant upon the public highways of this state which did not involve any such violations.

• • • • •

(i) Whenever the court shall find from the evidence that a commercial vehicle operator has habitually operated a commercial vehicle or more than one commercial vehicle in violation of Section 131 of this Act, it shall enter an order suspending the commercial vehicle operator's privilege of such commercial vehicle operator for a period of 90 days. If at any time thereafter in another proceeding brought under this section, the court shall find from the evidence that a commercial vehicle operator has again habitually operated in violation of Section 131 of this Act, it shall enter a similar order of suspension except that the court shall suspend the commercial vehicle operator's privilege of such commercial vehicle operator for a period of one year.

(j) Whenever the court shall enter any order under the provisions of Paragraph (i) of this section, it shall have full and continuing jurisdiction after the entry of such order to enforce any of the provisions thereof by contempt proceedings.

• • • • •

(l) Whenever any commercial vehicle is operated upon the public highways of this state by or on behalf of any person, firm or corporation at a time when the commercial vehicle operator's privilege of such person, firm or corporation is suspended as provided in this Act, the driver of

such vehicle shall be deemed guilty of a misdemeanor, the person, firm or corporation on whose behalf such commercial vehicle is operated shall be deemed guilty of a misdemeanor, and all agents, servants, employees or corporate officers of the person, firm or corporation on whose behalf such commercial vehicle is operated who shall have knowingly caused or permitted such commercial vehicle to be operated shall be deemed guilty of a misdemeanor, and any one or more or all of such persons, firms and corporations may be prosecuted for such violation. Any individual person convicted of such violation shall be punished by imprisonment for not less than 10 days nor more than 90 days and in the discretion of the court, a fine of not more than $500.00. Any corporation convicted of such a violation shall be punished by a fine of not less than $1000.00 nor more than $5000.00.

* * * * *

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 44

LATHAM CASTLE, ATTORNEY GENERAL OF THE STATE OF ILLINOIS, AND BASIL WILSON, STATE'S ATTORNEY OF MARION COUNTY, ILLINOIS,

Petitioners,

vs.

HAYES FREIGHT LINES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

REPLY BRIEF OF PETITIONERS.

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Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

REPLY BRIEF OF PETITIONERS.

I.

The Enforcement Provisions of the Illinois Act Are Not in Conflict With or Superseded By the Federal Act.

Respondent has cited no authority to sustain the concept that Congress under the Federal Motor Carrier Act asserts any power over the State in its regulation and enforcement of weight limitations upon commercial vehicles. This Court has stated in *Welch Company* v. *New Hampshire*, 306 U. S. 79, 85:

"* * * In construing Federal statutes enacted

> under the power conferred by the commerce clause of the Constitution * * * it should never be held that Congress intends to supersede or suspend the exercise of the reserve powers of a state, even where it may be done, unless and except so far as *its purpose to do so is clearly manifested.*" (Emphasis supplied.)

Respondent attempts to fortify its argument that the State Act was superseded with a line of Motor Carrier Cases (Interstate Commerce Commission Motor Carrier Cases) dealing with the issuance and revocation of certificates of convenience and necessity. (Respondent's Brief, pp. 6-22.) Obviously such decisions are irrelevant and have no weight as judicial precedent. In connection with the citation of these cases, respondent also refers to the provisions of Section 212(a) (49 U. S. C. Sec. 312(a)) of the Interstate Commerce Act relating to the suspension and revocation of certificates. This section of the Federal Act and the questions of suspension of a Federal certificate for cause, are not here involved.

Respondent would persuade this Court that because of its own economic considerations, not here involved, and its interpretation of the national transportation policy that the sanction in question would "* * * vitiate the primary objectives of the certificate provisions of the Federal statute."[1] The lower court apparently followed this argument when it said,

> "* * * Congress has legislated in this field 'to

1. In support of such argument respondent and the court below cite precedents which apply the supersession rule under varying circumstances. These cases do not involve a regulation protecting the travelling public and governing the use and conservation of state highways. We comment briefly: *Savage* v. *Jones*, 225 U. S. 501, involved a state statute to prevent fraud in sale of food for domestic animals; it was sustained against the charge that it had been superseded by the Pure Food Act. *McDermott* v. *State of Wisconsin*, 228 U. S. 115, dealt with a state statute for labelling corn syrup which was held to be in conflict with Pure Food Act. In *Fry Roofing Co.* v. *Wood*, 344 U. S. 157, a state statute granting

> the end of developing, co-ordinating and preserving a national transportation system of water, highways, and rail, * * * adequate to meet the needs of the commerce of the United States * * *.' "

While it is true that Congress has legislated generally in the field of interstate motor transportation, neither its statement of the national policy nor the provisions of the Federal Act impair in any manner that portion of the regulatory power of the State here in question. Further, Congress said specifically that it is the policy of the Federal government "* * * to cooperate with the several states and the duly authorized officials thereof * * *."[2]

Respondent's construction, rather than promoting cooperation with the several states, is predicated upon freedom from effective state control.

We comment briefly upon respondent's endeavor to dis-

---

certificate of convenience to an interstate motor carrier held not to be in conflict with the Federal Act. In *Western Union Telegraph Co.* v. *State of Kansas*, 216 U. S. 1, a state statute requiring payment of a fee by foreign corporation as a condition of doing business in state was held in violation of commerce clause. In *Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 148, a state statute preventing importation of renovated butter into state was held in conflict with Renovated Butter Act. In *Amalgamated Assoc. of Street, Electric Railway and Motor Coach Employees of America* v. *Wisconsin Employment Relations Board*, 340 U. S. 383, a state public utility anti-strike law was held in conflict with the National Labor Relations Act. Similarly, the lower court's citations are not applicable to the subject in question: *Western Union Telegraph Co.* v. *Massachusetts*, 125 U. S. 530, was concerned with a state statute prohibiting a corporation whose taxes were in arrears from carrying on business within the state. In *St. Louis Southwestern Railway Co.* v. *Arkansas*, 235 U. S. 350, a state franchise tax statute providing for forfeiture of a railroad's state franchise to do business in the state for failure to pay the tax was held a burden on commerce. In *Hill* v. *Florida*, 325 U. S. 538, a state statute licensing a union business agent was held in conflict with the National Labor Relations Act.

2. Note preceding Sec. 301, Title 49, U. S. C., full text printed in petitioner's brief, Appendix A, p. 59

tinguish the cogent authority of this court in *H. P. Welch Company* v. *New Hampshire*, 306 U. S. 79 (Respondent's brief, pp. 17-19, p. 34). This court states the issue in the *Welch* case specifically as follows at page 80:

> "* * * By this appeal, we are called on to decide whether, as applied in this case, * * * Sections 8 and 11 were *superseded* by the Federal Motor Carrier Act, 1935, Section 204, and regulations prescribed under it by the Interstate Commerce Commission." (Emphasis supplied.)

The Supreme Court of New Hampshire (*H. P. Welch Company* v. *State*, 89 N. H. 428, 199 Atl. 886) states the issue specifically as follows:

> "The company's next contention is to the effect that the state statute has been superseded by the Federal Motor Carrier Act, 1935 * * *."

This precise issue is now before the court. The *Welch* case is direct authority upon this issue as cited in our brief point III (Pet.'s brief, pp. 14-17).

Respondent's erroneous contention that interstate commerce was not involved under the issue in the *Welch* case is answered succinctly by this court at pages 81-82:

> "Appellant is a Massachusetts corporation doing intrastate and interstate business as a common and contract carrier of freight for hire by motor vehicles over public highways in that State and in New Hampshire. Approximately 99% of its business is interstate. * * * After notice and hearing, the Commission, * * * held appellant had violated the provisions of Section 8 and ordered that its certificates be suspended for five days. Appellant appealed to the State Supreme Court. That court upheld the challenged provisions and dismissed the appeal * * *."[3]

3. The New Hampshire court said: "Upon the authority of the cases last cited we hold that it was not the intention of Congress to enter the field of regulation of hours of service of truck drivers *engaged in interstate commerce* until the effective date of the

In resolving the issue in favor of the State in the *Welch* case, the following is a further answer by this court to the respondent (pp. 84-85):

> "* * * Our decisions provide no formula for discovering implied effect of federal statutes upon state measures such as that under consideration. * * *
>
> "The roads belong to the state. There is need of local supervision of operation of motor vehicles to prevent collisions, to safeguard pedestrians and the like. Unquestionably, reasonable regulation of periods of continuous driving is an appropriate measure. In view of the efforts of governmental authorities everywhere to mitigate the destruction of life, limb and property, resulting from the use of motor vehicles, it cannot be inferred that Congress intended to supersede any state safety measure prior to the taking effect of a federal measure found suitable to put in its place. Its purpose to displace the local law must be definitely expressed. * * *"

Notwithstanding the plain meaning of the *Welch* case and its direct application upon the issue here, respondent would have this court infer that Congress intended to supersede the reasonable enforcement provision. Such inference is unwarranted.

II

The Federal Certificate of Convenience and Necessity Is Not a Grant of the Right to Use the Highways of Illinois for the Conduct of Business.

Respondent's argument (and that portion of the lower court's decision here in question) is premised upon the proposition that under a certificate of convenience and

Interstate Commerce Commission's rulings upon the subject. * * * The violations of the state act charged against the company occurred before either of those dates and so at a time when the state act was in full force and effect." (Emphasis supplied.) (89 N. H. 428, 159 Atl. 886.)

necessity issued by the Interstate Commerce Commission, respondent has an absolute right to conduct its business upon the highways of the State of Illinois. Such premise is contrary to the fundamental character of the certificate. The issuance of such a certificate is permissive and without it, respondent cannot engage in interstate commerce as a common carrier by motor vehicle.[4] The Act does not provide or imply that one who receives such a certificate shall be entitled to the use of the public highways of a particular state. As we have previously pointed out, Congress specifically provided that a certificate issued pursuant to the Act does not convey "any proprietary right in the use of the public highways * * *."[5]

Respondent and the lower court concede the power of the State to regulate the size and weight of commercial vehicles under the authority of the *Barnwell*[6] and *Maurer*[7]

4. Sec. 306 of the Federal Act (Part II Interstate Commerce Act, 49 U. S. C. Sec. 306) sets forth the requirement for a *certificate* of convenience and necessity for a common carrier engaged in interstate commerce. Sec. 309 of the Act provides for a *permit* to be issued to a contract carrier engaged in interstate commerce. Private carriers engaged in interstate commerce are not subject to any "certificate" or "permit" under the Federal Act. The power and duty of the Interstate Commerce Commission to regulate each *kind* of carrier is provided in Sec. 304. The common carrier is regulated as to service, records, qualifications and hours of service of employees and safety of operation and equipment. The contract carrier is regulated as to records, qualifications and hours of service of employees and safety of operation and equipment. The private carrier, if need is found, may be regulated only as to requirements to promote safety of operation and to that end, prescribe qualifications and hours of service of employees and standards of equipment. The respondent's certification argument falls of its own weight when applied to the interstate *contract* carrier or *private* carrier who, also under the present decision, are excluded from the operation of the enforcement provision.

5. 49 U. S. C. Sec. 307(b).

6. *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177.

7. *Maurer* v. *Hamilton*, 309 U. S. 598.

cases. However, the logic of these decisions is studiously avoided by respondent in drawing a fine line between the State's power to regulate and the power to enforce such regulations.[8] Respondent here, as did the interstate truckers in the *Barnwell* case, asserts that the State Act was superseded by the Federal Act and is invalid, as a burden upon interstate commerce when applied to interstate operations.

It is settled that the Federal Motor Carrier Act does not supersede the power of the state to regulate size and weight and the question, therefore, is simply one of the reasonableness of the enforcement provision.

If the decision of the Supreme Court of Illinois is sustained, Illinois may enforce a statute valid in all respects but may not enforce it against interstate carriers. The lower court in the *Barnwell* case, held, as the Illinois Court has held in this case, that the sanction in question was constitutional as to due process but placed an unlawful burden upon interstate commerce. The effect of the lower court's decision in each case is identical. In the *Barnwell* case, this court reversed the lower court and said:[9]

> "The trial court rested its decision that the statute unreasonably burdens interstate commerce, upon findings, not assailed here, * * * and upon its conclusion

8. Respondent admits that the State may inflict "the usual civil or criminal penalties including fine or imprisonment * * *." (Respondent's Brief, p. 23.) However, respondent does not nor could it demonstrate that the enforcement provisions are unreasonable, or, if applied uniformly to both intrastate and interstate commerce, a denial of due process. Further, respondent is not in a position to quarrel with the state legislative choice of the sanction. In dismissing respondent's appeal for want of a substantial Federal question, this court has upheld the validity of the provisions in question as against the contention they are unreasonable or invidiously discriminatory in the denial of due process (*Hayes* v. *Castle, et al.*, 347 U. S. 904, 74 S. Ct. 866) and in this respect affirmed the court below. (Rec. pp. 53-58; *Hayes* v. *Castle*, 2 Ill. 2d 58, 63-69.)

9. *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 182, 184.

that, when viewed in the light of their effect upon interstate commerce, these restrictions are unreasonable • • •

"In reaching these conclusions, and at the same time holding that the weight and width limitations do not infringe the Fourteenth Amendment, *the court proceeded upon the assumption that the commerce clause imposes upon state regulations to secure the safe and economical use of highways a standard of reasonableness which is more exacting when applied to the interstate traffic than that required by the Fourteenth Amendment as to all traffic;* that a standard of weight and width of motor vehicles which is an appropriate state regulation when applied to intrastate traffic may be prohibited because of its effect on interstate commerce, although the conditions attending the two classes of traffic with respect to safety and protection of the highways are the same." (Emphasis supplied.)

After discussing the nature and source of the State's power concerning the use of its highways and in sustaining the sanction both as to due process and the commerce clause, the court then said on page 189:

"This court has often sustained the exercise of that power, although it has *burdened* or *impeded* interstate commerce." (Emphasis ours.)

Assuming, without determining that Congress could regulate the size and weight of vehicles upon the highways under the commerce clause, admittedly Congress is not so acting. The answer to the assumption that the commerce clause employs a different standard than the Fourteenth Amendment is again found within the *Barnwell*[10] case. The court said at page 190:

"• • • the judicial function under the commerce clause, as well as the Fourteenth Amendment, stops

[10] *South Carolina Highway Dept. v. Barnwell Bros.*, 303 U. S. 177, 190.

> with the inquiry whether the state legislature in adopting regulations such as the present has acted within its province and whether the means of regulation chosen are reasonably adapted to the end sought."

Applying the test of the *Barnwell* case, that the regulation of weight is within the power of Illinois, the means of regulation is reasonably adapted to the end sought.[11]

III.

The Illinois Regulation Is a Valid Exercise of the State's Exclusive Power Over Its Highways.

1. Under part II of its brief,[12] respondent attempts to inject within the framework of the case the suggestion that Illinois regulates interstate commerce as such. It said: "The question here is simply what conditions and what forfeitures Illinois may constitutionally place upon interstate motor carriers using its highways in the light of the fact it has voluntarily opened such highways to interstate motor traffic."[13]

The short answer is that the Illinois statute imposes the same condition upon interstate carriers as upon intrastate carriers; i. e., compliance with regulations relating to size and weight of vehicles. The "forfeiture" to be exacted from interstate motor carriers is that to be exacted from intrastate carriers; i. e., when a carrier habitually violates Illinois regulations as to weight, its privilege to use the highways as a place of business is suspended.

11. "The State's continuing search for effective enforcement techniques to secure compliance with valid weight limits is apparent in the legislation dealing with the subject. * * * The General Assembly might infer that the truckers find the payment of statutory penalties when violation is established to be economically preferable to compliance." (*Hayes Freight Lines, Inc.* v. *Castle*, 2 Ill. 2d 58, 68-69; Rec. p. 58.)

12. Respondent's Brief, pp. 31-36.

13. Respondent's Brief, pp. 32-33.

It is interesting that American Truck Associations, Inc., cites from the opinion of this court in *Buck* v. *Kuykendall*, 267 U. S. 307.[14] The language therein cited, purportedly to demonstrate that the Illinois statute is unlawful, fails in its purpose. Rather it strikingly demonstrates the difference between the action proscribed by this court and the Illinois legislation. In *Buck* v. *Kuykendall*, this court said of the Washington statute:

> "Its primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition."

The Illinois statute is an enactment "with a view to safety" and "to conservation of the highway." It is not "directed at competition."

Counsel have further quoted: "It (the Washington statute) determines not the manner of use, but the persons by whom the highways may be used." The Illinois statute "determines the manner of use" only in that the motor carrier improperly loads at the risk of losing the privilege of conducting a business on the state highway. The Illinois Act is directed at "persons by whom the highways may be used" only in that it is directed at those who habitually violate lawful regulations as to weight when using the highways.

Again quoting from this court in the *Buck* case, counsel said, "Moreover, it (the Washington statute) determines whether the prohibition shall be applied by resort, through state officials, to a test which is peculiarly within the province of the Federal action—the existence of adequate facilities for conducting interstate commerce."

If we apply the argument of *amicus*, the American Trucking Associations, Inc., to the assertion of respondent,

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14 Brief of American Truck Associations, Inc., *amicus curiae*, p. 13

it is clear that the Illinois statute sedulously avoids any attempt at invading the purview of the Federal regulation, namely, authorizing or limiting carriers in interstate commerce except suspension of the right to operate in Illinois as an incident to such suspension limits the right to compete to those who obey the law.

It is urged by counsel for *amicus*, American Trucking Associations, Inc. (Br. p. 16), that a state could not preclude a railroad from crossing its highway as an incident to its police power or other power to regulate its highways and cite the opinion of this court in the case of *Atchison, T. & S. F. Ry. Co.* v. *P. U. C.*, 346 U. S. 355, 74 S. Ct. 72, 97. The cited case demonstrates the power of the state to compel a railroad to remove its tracks from a highway: to separate a crossing of a highway and a railroad by a viaduct or by a subway is to remove the railroad from the highway. As Mr. Justice Minton pointed out "the fact that the improvements may interfere with interstate commerce is incidental. The construction and use of public streets is a matter peculiarly of local concern and great leeway is allowed local authorities *where there is no conflicting regulation, even though interstate commerce be subject to material interference.*" (Emphasis supplied.)

Conclusion

The State of Illinois can legislate as to size and weight of motor carriers; and it may also provide for the reasonable enforcement of such legislation. The sanction of suspension is reasonable. It is to be applied uniformly and without discrimination. The decision below should be reversed, and the statute challenged held constitutional.

Respectfully submitted,

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BRIEF OF THE AMERICAN AUTOMOBILE ASSOCIATION, INC., AS AMICUS CURIAE.

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FOREWORD.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 44.

LATHAM CASTLE, ATTORNEY GENERAL OF THE STATE OF ILLINOIS, ET AL.,

Petitioners,

vs.

HAYES FREIGHT LINES, INC.,

Respondent.

ON CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF OF THE AMERICAN AUTOMOBILE ASSOCIATION, INC., AS AMICUS CURIAE.

FOREWORD.

In the belief that a brief and argument from the viewpoint of the motoring public would be helpful to the Court in the study of this case we have prepared this brief. In a word, we suggest that the law here in question is but a legitimate means of enforcing the police power of the sovereign state, and was exercised to protect the public highways from destruction and thus to contribute to the safety of all citizens using the public ways and to facilitate the flow of all highway commerce, both interstate and local.

We suggest that the State of Illinois built the roads in question, has the duty to maintain and police them, and that they are not a federal responsibility. In the course of time they have been built, repaired, and rebuilt,—each time to carry heavier and heavier loads; and we respectfully suggest that until the Federal Government shall have taken over the proprietorship of the state highways, their upkeep and repair, and have taken over the exercise of police powers over them, to protect them against destruction the state must function as the proprietor and bear that responsibility.

We suggest also that one having formal federal permission to carry merchandise through state borders gets no *carte blanche* to truck as he pleases. He is subject to federal regulation, so far as it goes, and to proper state regulations which are not repugnant to the federal regulation, which do not discriminate against interstate commerce, and which do not unduly burden such commerce. He must, as he enters another state, obey its laws uniformly governing all vehicles to promote safety and the conservation of its highways, in the absence of any conflicting federal rule to which he is subject. It is the duty of the owner of such a truck, in loading, to observe a proper margin of safety as to weight, with an eye always on the marginal line, claiming no preference or immunity because his trip begins in one state and ends in another. The permit or certificate issued by the Interstate Commerce Commission cannot operate as a license to destroy the state highways. The state may protect the highways against unreasonable wear and tear, uniformly penalizing all who violate, and may impose adequate sanctions, without discrimination against interstate commerce, to deter the habitual violations which hasten pavement destruction.

We make the following suggestions:

I.

Damage to Highways From Overweight of Heavy Vehicles Threatens the Continued Existence of the Road Facilities Over Which All Highway Commerce Moves. Congress Has Recognized That This Problem Is for the States to Solve, Even Though Other Separate Problems Touching Upon Interstate Commerce By Highway Vehicles Have Been Entrusted to a Federal Agency.

(a) Federal Investigation Has Established the Fact That Overloaded Vehicles Are Destroying the Highways.

(b) Part II of the Interstate Commerce Act Does Not Regulate in This Field Nor Authorize a Federal Agency to Regulate With Respect to This Problem, but Leaves the Solution to the States.

(a) Federal Investigation Has Established the Fact That Overloaded Vehicles Are Destroying the Highways.

The American Automobile Association appears in this case because it is deeply interested on behalf of its 4,500,000 members and their families, and the motoring public generally, in supporting the efforts of the states to cope with the serious and difficult problem of enforcement of laws regulating the weight of motor vehicles. That this is a serious and difficult problem admits of no doubt. In hearings before the Subcommittee on Domestic Land and Water Transportation of the Committee on Interstate and Foreign Commerce of the United States Senate, pursuant to Senate Res. 50, 81st Congress, 2nd Session, Thomas H. MacDonald, Commissioner, U. S. Bureau of Public Roads, said in June, 1950 (pp. 980-981):

> "Observations of damage unquestionably attributable to excessive axle loading have been reported with increasing regularity by highway authorities all over the country. Circumstantial proof of the cause is found in the fact that the damage is occurring where heavy weights are known to be present and is not oc-

curring on roads of lighter traffic; it is occurring on the outer lanes of four-lane pavements where trucks move in greatest numbers and not on the inner lanes where automobiles pass trucks; in many instances it is observed to occur on the sides of roads known to be traveled by heavily loaded out-bound vehicles and found to be absent on the other sides used by the same vehicles returning light. But such circumstances only confirm the judgment of cause that competent observers are able to form from the nature of the damage itself. Load damage of highways of various types has characteristic forms that are distinguishable from the forms of damage resulting from other causes.

* * * * *

"In 1931, such excessive loads were occurring on no more than eight axles in each thousand trucks. Today, as previously stated, there are about 86 such excessive loads for each thousand vehicles; and, truck traffic volumes having increased about threefold in the interval, the increase in frequency of excessive loading has been of the order of 8 to 250, or over thirty-fold. In view of this increase of loading above the general design limits, the probability that traffic loads are today an important factor in the causation of road damage is at least as great as the probability that they were a minor factor in 1931. And the probability of present road damage is confirmed as an actuality by the widespread and numerous reports of such damage.

"The evidence of serious road damage caused by excessively heavy axle loads is now abundant and irrefutable."

It is to be kept in mind that Congress has refused to place upon the Federal government any responsibility for enforcement of laws designed to preserve the lives of highways by limiting the weight of motor vehicles. Although Congress has recognized that this is a major problem, it has so far expressly committed resolution of this problem to the states. *Maurer* v. *Hamilton*, 309 U. S. 598. The

issue in this case must be considered in the light of this express action of Congress.

It must also be considered in the light of the problem facing the states, its importance and its magnitude. No citation of authority is needed to demonstrate that highway building, financing, maintenance, and protection of public safety on the highways, constitute a major, integrated, problem. The annual Conference on Street and Highway Safety convened each year by the President of the United States, the recent proposals of the President for the expenditure of vast sums for highway improvement, the annual shocking death and injury toll on the highways, are matters of common knowledge.

The role of the heavy vehicle in this problem was summarized in part in the Annual Report of the Bureau of Public Roads, Department of Commerce, for fiscal year 1953, as follows (pp. 35-36):

> "Overall costs of freight transportation by highway include the cost of owning, maintaining, and operating trucking equipment, and such costs of constructing and maintaining highway facilities as may properly be assigned to freight vehicles. *Trucking costs diminish as the size and weight of vehicles increase, but highway costs increase.*" (Emphasis supplied.)

Loading of vehicles above the lawful limits, by damaging the highway surface, increases the costs of the highways and renders the highways less safe to travel. The ordinary motorist has a direct interest in the adequate enforcement of laws designed to protect the highways by limiting the weight of vehicles.

The damage caused by loading beyond legal limits was described by Mr. MacDonald in the above cited hearing. He was there referring to damage caused by exceeding the axle load limit of 18,000 pounds common to most states, including Illinois. It will be remembered that respondent

seeks to excuse its multiple violations by the claim that they were principally overloading of axles beyond the 18,000 pounds limit. Mr. MacDonald said that such violations were the principal cause of highway failure. Here is his description of the damage so caused (p. 980):

> "In concrete pavements the occurrence of diagonal corner cracking, cracks extending inward from the slab edges partially across the slab, major criss-cross cracking and certain types of cracks, either approximately longitudinal or approximately transverse, and shattered areas proceeding from initial crack formation are almost invariably indicative of load failure. The pumping of water from the joints of concrete pavements has been found to be associated with presence in the traffic stream of vehicles having axle loads in excess of about 14,000 pounds. When pumping occurs, subgrade material of certain types may be carried in suspension in the water with resulting loss of subgrade support of the pavement. This action is almost invariably associated with the presence of heavy axle loads in frequent repetition.
>
> "On bituminous and other flexible types of surface, load damage is indicated by the formation of longitudinal ruts and certain types of waving showing, and corrugation of the surface, by the formation of pot holes, and by breakdown of the pavement edges. Damage, not always superficially evident, occurs in the form of an excessive internal fragmentation and attrition of the mineral aggregate of the pavement or surface.
>
> "Observation of these forms of damage leaves no doubt that road damage caused by overloaded trucks has in recent years grown to alarming proportions."

It is beyond question that one of the major problems facing Illinois and other states is adequate enforcement of truck weight limits in order to preserve the highways.

(b) Part II of the Interstate Commerce Act Does Not Regulate in This Field Nor Authorize a Federal Agency to Regulate With Respect to This Problem, but Leaves the Solution to the States.

It is equally clear that Congress has recognized this enforcement problem to belong entirely to the states and has carefully refrained from attempting to enact any solution of its own, even with respect to the interstate truck traffic which, in many details, may be made subject to federal jurisdiction.

The federal legislation under which respondent claims its right to engage in interstate commerce (Part II of the Interstate Commerce Act, 49 U. S. C. 301, *et seq.*) expressly reserved to the states the right to enforce, as to interstate carriers, the sanction provided in Section 132.02 of the Illinois law.

The Supreme Court of Illinois held the act invalid solely as to the interstate operations of motor carriers authorized to operate under Part II of the Interstate Commerce Act. But the Court overlooked the significance of that provision of Part II which directed investigation of the need for federal regulation in the field and thus expressly reserved to the states the power which Illinois is here attempting to exercise.

Part II of the Interstate Commerce Act, under which appellee claims the right to engage in interstate motor carrier operations, provides (sec. 226, 49 U. S. C. 325):

> "The Commission is hereby authorized to investigate and report on the need for Federal regulation of the sizes and weight of motor vehicles and combinations of motor vehicles * * *."

This provision was considered by the Supreme Court of the United States in *Maurer* v. *Hamilton*, 309 U. S. 598, and the Court discussed its legislative history quite extensively. Relying upon this provision and its legislative

history the Court held valid a statute of Pennsylvania which banned absolutely from the highways vehicles which had been expressly authorized to operate by the Interstate Commerce Commission under Part II of the Interstate Commerce Act.

The Court quoted and obviously relied upon for authority in reaching its decision the following statements, explaining the above quoted section 226, from the testimony of Joseph B. Eastman before the Senate Committee on Interstate Commerce while the Committee was considering the legislation which became Part II of the Interstate Commerce Act. Mr. Eastman was the chief author of the legislation and was a member of the Interstate Commerce Commission and Federal Coordinator of Transportation. He said (309 U. S. pp. 608, 609):

> "But on this question of sizes and weight of motor vehicles which is an extremely important matter from the standpoint of public safety and convenience, there is not only the question here as to what those sizes and weights ought to be from the standpoint of road construction and road use, but there is also the legal question as to whether the Federal government can exercise power over the matter or whether it is a matter exclusively within the jurisdiction of the states. It was because of doubts not only as to the facts with reference to that matter, but also to the law that provisions were made for this investigation."
>
> "With respect to size and weight of vehicles • • • we do not undertake in this bill to cover that situation except to provide for a thorough investigation of it by the Commission with recommendations to Congress because there is involved not only a question of fact as to what the regulation should be, but also as to how far the federal government has power to interfere with the exercise of the police power of the states with respect to the use of their highways. They have the right to protect their highways against

> unsafe or unreasonable use, but whether or not the federal government can come in and interfere with it I cannot say at this time."

Maurer v. *Hamilton*, *supra* (309 U. S. 598), was decided in 1940, but Congress has made no attempt since then to impair the power of the states relating to the regulation of the sizes and weight of motor vehicles.

The motor carrier involved in *Maurer* v. *Hamilton* had been granted a certificate of public convenience and necessity by the Interstate Commerce Commission to operate as an interstate motor carrier, just as has appellant in the instant case. Further, after a hearing the Commission held that the vehicles affected by the Pennsylvania statute could be lawfully operated pursuant to such certificates despite the state law. But the Court held that the state had the absolute and unfettered right to ban the vehicles in question from its roads, by reason of the reserved power in the state which Congress had not attempted to disturb.

In *South Carolina* v. *Barnwell Bros.*, 303 U. S. 177, the Court held valid a state law limiting the total gross weight (weight of vehicle and load) of a single vehicle or combination of vehicles to 20,000 pounds, despite the admitted fact that the law prevented many interstate motor carriers from conducting *any* operations in the state.

In discussing the state's power the Court made a statement of particular significance here. The motor carriers objected that the 20,000 pounds gross weight limitation was a wholly irrational method of preventing damage to the roads. They presented evidence that wheel and axle weights were the critical factors in pavement damage and not gross weight, and that the roads could be better protected by wheel and axle weight limitations which at the same time would not deny to the carriers the use of their vehicles that was denied by the 20,000 pounds gross weight

law. Admitting for purpose of argument the soundness of this contention, the Court nevertheless held the 20,000 pounds gross limitation valid simply *because it was easier to enforce* than a wheel or axle weight limitation. The Court said (303 U. S. pp. 192-3):

> "* * * The choice of a weight limitation based on convenience of application and consequent lack of need for rigid supervisory enforcement is for the legislature, and we cannot say that its preference for the one over the other is in any sense arbitrary or unreasonable. * * *"

Illinois could by statute ban all vehicles with a gross weight of more than 20,000 pounds, and that would prevent appellant from conducting any operations at all. By thus keeping the big motor carriers off the highways the state could avoid the evils of overloaded trucks. But the state has not as yet elected to pursue such a drastic remedy. Instead it permits motor carriers to carry loads which are sufficiently large to permit an economic business operation, but it has conditioned its permission to carry such loads on strict compliance with the law. It has just as much right to exercise its reserved powers to protect its highways in that fashion as the states had in the exercise of the powers considered in the *Maurer* and *Barnwell* cases. In those two cases the states imposed an absolute, perpetual ban; in the instant case the ban is for only ninety days. And the ninety days prohibition is applied only to a carrier who has demonstrated by its conduct a clear intention to defy the state's reasonable truck weight requirements. *Maurer* v. *Hamilton*, *supra* (309 U. S. 598), and *South Carolina* v. *Barnwell Bros.*, *supra* (303 U. S. 177), carefully read, are clear authority to sustain the Illinois statute.

So also are the earlier cases, decided before Part II of the Interstate Commerce Act was enacted. In *Sproles* v.

Binford, 286 U. S. 374, a Texas statute was held valid which limited the *net load* which could be carried on a vehicle or combination of vehicles to 7,000 pounds. The reason assigned for validity was *ease of enforcement*.

In *Morris* v. *Duby*, 274 U. S. 135, an order of the Oregon Highway Commission reduced the permissible truck gross weight (vehicle and load) from 22,000 to 16,500 pounds. This order and the Oregon statute under which it was made were held valid, despite the undisputed evidence that it would ban certain interstate trucking operations. The Court said (274 U. S. p. 144):

> "The mere fact that a truck company may not make a profit unless it can use a truck with a load weighing 22,000 or more pounds does not show that a regulation forbidding it is either discriminatory or unreasonable."

In the Oregon case the State Highway Commission permanently banned certain motor carrier traffic as a means of conserving the state's roads. That action was held valid. In this case the ban is for only ninety days, and applies to only one carrier.

It is clear from these cases that the state has the power exercised in the Illinois act to protect its highways from damage, and it is further clear that Part II of the Interstate Commerce Act, under which respondent claims the right to operate in interstate commerce, has reserved that power to the state.

II.

This Is a Declaratory Action Involving Only the General Validity of the Suspension Provisions of the Act. The Courts Have Adequate Power Under the Act to Deal With Individual Cases to Avoid Injustices. Therefore Respondent's Argument as to the Effects of the Act in Individual Cases Is Not Relevant Here. There Is Involved Here Only the Question Whether the Suspension Provisions Are Valid When the State Makes a Proper Case Under the Statute.

Respondent has agreed that the suspension provisions of the statute are somehow invalid because they may in individual cases not now before the Court impose some unwarranted hardship. A great deal could be said in answer to that, but it is sufficient here to note that this is a declaratory action involving only the general validity of the suspension provisions of the statute. In a suspension proceeding under the statute, which this is not, the court hearing such proceeding is governed, among other things, by the following provision designed to safeguard the rights of motor carriers:

> "* * * In any proceeding brought under this section, the court shall not find that a defendant has habitually operated one or more commercial vehicles in violation of Section 131 of this Act unless and until the court shall have considered the evidence to the contrary, if any, offered by the defendant, and such evidence may include, but shall not be limited to, evidence relating to the character and gravity of such violations and the extent of the operations of commercial vehicles by or on behalf of such defendant upon the public highways of this state which did not involve any such violations." Sec. 132.02 (g).

Thus in a suspension proceeding, which must be brought in order to suspend a motor carrier's operating rights, a defendant motor carrier is not automatically adjudged properly fit for suspension, but he can, on the contrary, show cause why even multiple violations do not constitute due cause for suspension. He is entitled to a full hearing. It cannot be presumed in the instant case that, in other cases, he will not receive a fair hearing or that the courts will not enter judgments required by particular facts.

Therefore respondent cannot argue here matters which should be addressed to a court in a suspension proceeding. It may well be that the rights of some motor carriers may not be suspended by the courts after hearing all of the evidence. The statute is clearly and carefully designed to provide for consideration by the courts of each individual case.

The only issue that is before the Court in this proceeding is whether the suspension provision is *prima facie* valid under the Commerce Clause. Once that issue is determined, the issue whether the operating rights of a particular motor carrier shall be suspended must be considered upon a full hearing of the merits. In such further proceedings the various arguments advanced by respondent may become pertinent, but they are not relevant here.

III.

The Decision of the Supreme Court of Illinois Is Squarely in Conflict With H. P. Welch Co. v. New Hampshire, 306 U. S. 79.

It is respectfully suggested that the decision of the Supreme Court of Illinois is squarely in conflict with the decision of this Court in *H. P. Welch Company* v. *New Hampshire*, 306 U. S. 79. In that case Welch Company

was operating in interstate commerce as a motor common carrier under authority of the (Federal) Motor Carrier Act, 1935 (49 Stat. 543), now Part II of the Interstate Commerce Act (49 U. S. C. 301, *et seq.*, 54 Stat. 919). It also did an intrastate business in New Hampshire, but 99 per cent of its business over the New Hampshire roads was interstate. In 1937 it permitted its drivers on several occasions to operate its vehicles longer continuous hours than permitted by the New Hampshire laws. For these offenses the New Hampshire Public Service Commission suspended its right to operate over the New Hampshire highways in interstate and intrastate commerce for five days, under the provisions of a New Hampshire statute. This Court sustained this state action as valid under the Commerce Clause and the 14th Amendment.

It will be noted that in every significant particular the *Welch* case is similar to the instant case. Welch and Hayes were operating in interstate commerce pursuant to the authority of Part II of the Interstate Commerce Act. Each violated state laws intended for the safeguarding of highway traffic. At the time Welch violated the New Hampshire hours of service law there was no Federal regulation of hours of service. At the time Hayes violated the Illinois truck weight laws there was no Federal regulation of truck weights, nor is there any now. *Maurer* v. *Hamilton*, 309 U. S. 598. Because there was no Federal regulation of hours of service at the time Welch violated the New Hampshire laws this Court held that the state had the right to invoke its penalty of suspension despite the fact that Welch was operating in interstate commerce under the authority of what is now Part II of the Interstate Commerce Act. Since there is now no Federal regulation of weight or size of vehicles of interstate carriers, the *Welch* case, in principle, is precise authority to sustain the suspension provisions of the Illinois statute.

The Supreme Court of Illinois attempted to distinguish the *Welch* case (306 U. S. 79) by saying that the case "strongly suggested that this power of the State would be superseded when the Federal Motor Carrier Act became effective." (R. 60.) Obviously the Illinois Court did not differentiate, as did this Court, between the *existence* of the power of the federal government to put into force a regulation conflicting with state law, and the *exercise* of such power. When this Court in the *Welch* case spoke of the possible supersession of state law by Federal action it was referring *only* to *possible* supersession of the state hours of service law by Federal regulation of hours of service. Thus this Court assumed "without so deciding" that "when the federal regulations take effect they will operate to supersede the challenged provisions of the state statute." (306 U. S. p. 84.) But this Court held that until the Federal regulations of hours of service became effective the state had the power to punish multiple violations of its own laws on the subject by barring from its roads for five days a carrier operating in interstate commerce under authority of Part II of the Interstate Commerce Act. This Court *did not hold* that the existence of Part II of the Interstate Commerce Act superseded the state power; it held exactly the contrary. Paraphrasing the Court's reasoning in the *Welch* case, since there is no Federal regulation of weight of vehicles, the action of the State of Illinois in suspending the right of an interstate carrier for multiple violations of the Illinois weight laws, has not been superseded by any Federal action.

IV.

The Decision of the Illinois Court Is Not in Accord With Bradley v. Public Utilities Com., 289 U. S. 92, and McDonald v. Thompson, 305 U. S. 263.

It is respectfully suggested that the decision of the Supreme Court of Illinois is not in accord with the decisions of this Court in *Bradley* v. *Public Utilities Commission of Ohio*, 289 U. S. 92, and *McDonald* v. *Thompson*, 305 U. S. 263.

In the *Bradley* case, the state commission denied Bradley, a motor carrier, the right to operate in interstate commerce over an Ohio highway on the basis of its finding that the road was already so congested that the addition of Bradley's vehicles would create undue traffic hazard. This Court held this action valid despite the claim that it violated the Commerce Clause. The point to be kept in mind in connection with the *Bradley* case is that in two earlier cases this Court had held that the states lacked the power to deny interstate operating authority upon economic grounds, that is, upon considerations of public convenience and necessity. (*Buck* v. *Kuykendall*, 267 U. S. 307, and *Bush* v. *Maloy*, 267 U. S. 317.) In distinguishing the *Bradley* case from the two earlier cases this Court said (289 U. S. p. 95):

> "In those cases, safety was doubtless promoted when the certificate was denied, because intensification of traffic was thereby prevented. * * * But there promotion of safety was merely an incident of the denial. Its purpose was to prevent competition deemed undesirable. The test employed was the adequacy of existing transportation facilities; and since the transportation in question was interstate, denial of the certificate invaded the province of Congress. In the case at bar, the purpose of the denial was to promote safety;

and the test employed was congestion of the highway. The effect of the denial upon interstate commerce was merely an incident."

Thus, before the (Federal) Motor Carrier Act of 1935 was enacted the states had no power to deny interstate operating authority upon economic grounds because that "invaded the province of Congress" even during a period of Congressional inaction. But, as shown by the *Bradley* case, the states could deny interstate authority upon grounds of safety. The enactment of the Motor Carrier Act in 1935 simply gave to the Interstate Commerce Commission a power which up to then neither states nor federal government had possessed, the power to grant or deny interstate motor carrier authority upon economic grounds. But that act did not take from the states their already existing rights to deny interstate authority on grounds of safety, at least not until Congress shall have tried to take over a particular field of safety occupied by the states. *Welch* v. *New Hampshire*, *supra* (306 U. S. 79). Congress, instead of trying to assume the power to regulate weights and sizes of motor vehicles, has recognized that power to be in the states. *Maurer* v. *Hamilton*, 309 U. S. 598. And it is entirely clear from *Welch* v. *New Hampshire* that the states' reserved power to control the weights and sizes of vehicles of interstate carriers can be exerted in the form of a suspension of the right to operate on the states' highways for multiple violations of weight restrictions.

In *McDonald* v. *Thompson*, *supra*, 305 U. S. 263, this Court held that Texas could bar McDonald from operating on Texas roads in interstate commerce *after* the (Federal) Motor Carrier Act, 1935, was enacted, because of his violation of Texas laws in 1934. The violation consisted of operating in interstate commerce after the state had forbidden the operation on the ground of highway congestion.

V.

The National Transportation Policy Requires Federal Co-operation With the States, Not Denial of State Powers, at Least in the Absence of Specific Supersession by Congress.

We respectfully suggest that the Supreme Court of Illinois erred in holding that the enactment of the Motor Carrier Act, 1935, 49 Stat. 543, now Part II of the Interstate Commerce Act, 54 Stat. 919, 49 U. S. C. 301, *et seq.*, and the National Transportation Policy, 54 Stat. 899, 49 U. S. C., preceding Sec. 1, superseded the power of the State of Illinois to enforce the statute in issue as to interstate carriers.

In enacting what is now Part II of the Interstate Commerce Act Congress left to the states the power to enforce regulation of size and weight of motor vehicles operated in interstate commerce. *Maurer* v. *Hamilton*, 309 U. S. 598. This power can be exercised even though it results in barring permanently in one state the use of certain vehicles in interstate commerce which are lawful in other states. *Maurer* v. *Hamilton, supra; South Carolina State Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177; *Morris* v. *Duby*, 274 U. S. 135.

The general statements of the National Transportation Policy cannot affect the specific language of Section 226 of the Interstate Commerce Act, 49 U. S. C. 325, which provides in part:

> "The Commission is authorized to investigate and report on the need for Federal regulation of the sizes and weight of motor vehicles and combinations of motor vehicles. * * *"

In *Maurer* v. *Hamilton, supra*, 309 U. S. 598, the Court held that this language exhibited the will of Congress that at

least until there should be some action by Congress in the field of sizes and weight regulation, the power to regulate that subject remained in the states.

Indeed the general statements of the National Transportation Policy lend support to the view that the national interest would be best served by effective enforcement of state laws designed to preserve the highways from destruction. The enumerated items in the National Transportation Policy are expressed to be "all to the end of developing, coordinating and *preserving a national transportation system by* water, *highways*, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense." (Emphasis supplied.)

Since Congress has expressly refrained from entering the field of regulation of sizes and weight of interstate motor vehicles, the states are left free to protect their investments in highways by laws enacted for that purpose. The Illinois statute in question should not be declared invalid on its face and in the absence of any showing that it will be enforced arbitrarily and oppressively. The provisions in the act for full hearing are adequate to insure that the state will use the statute only to the extent actually necessary to safeguard its highways.

Conclusion.

Rather than burdening interstate commerce, the Illinois Act facilitates it. By penalizing those who repeatedly commit the offense which destroys highways the state law encourages conduct which will preserve the roads so that they may provide the avenues over which both interstate and local traffic may move. It seems apparent that those truck owners who, by their overloading of vehicles, contribute to pavement damage, impose a tremendous burden on inter-

state commerce by destroying the instrumentality which serves such commerce, and that a law designed to reduce such a burden affects interstate commerce, if at all, only beneficially.

We conclude that the State of Illinois can rightfully penalize the continual, repeated and habitual operations of overweighted conveyances over its highways by temporarily suspending the permit to operate as here done; and that the opinion of the Supreme Court of Illinois should be reversed and cause remanded for further proceedings.

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OCTOBER TERM, 1954.

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LATHAM CASTLE, ATTORNEY GENERAL OF THE STATE OF ILLINOIS, ET AL.,

Petitioners,

vs.

HAYES FREIGHT LINES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF FOR THE RESPONDENT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 44.

LATHAM CASTLE, ATTORNEY GENERAL OF THE STATE OF ILLINOIS, ET AL.,

Petitioners,

vs.

HAYES FREIGHT LINES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF FOR THE RESPONDENT.

OPINION BELOW.

The opinion of the Supreme Court of Illinois (R. 50-62) is reported at 2 Ill. 2d 58 and at 117 N. E. 2d 106.

JURISDICTION.

The judgment of the Supreme Court of Illinois was entered on January 20, 1954 (R. 62). The petition for certiorari was filed April 19, 1954, and was granted June 7, 1954. Jurisdiction of this Court rests upon 28 U. S. C. Section 1257 (3).

STATUTES INVOLVED

Appendix A of petitioners' brief reproduces the following sections of Part II of the Interstate Commerce Act, originally enacted as the Federal Motor Carrier Act of 1935: 49 U. S. C. Sections 302(a), 304(a), part of 306(a)(1), 307(b) and 325. In addition to the foregoing respondent regards as relevant the following sections of Part II of the Interstate Commerce Act which are printed in Appendix A herein: 49 U. S. C. Sections 306(a)(1) including proviso, 312(a) and 316(b). Petitioners also reproduce as Appendix B certain excerpts from Ill. Rev. Stats., 1953 Ch. 95½, Par. 229b. We reproduce for the convenience of the Court in Appendix B herein Sections 228(a), (b) and (c), 229a and 229b of Ill. Rev. Stats., 1953 Ch. 95½.

QUESTION PRESENTED FOR REVIEW.

Whether a state statute authorizing the suspension of the right to operate over highways of the state as punishment for prior violations of state highway regulations, insofar as applicable to the interstate operations of motor carriers holding certificates of public convenience and necessity issued by the Interstate Commerce Commission, is in conflict with and superseded by Part II of the Interstate Commerce Act.

STATEMENT OF THE CASE.

Respondent accepts the statement of the case as presented in petitioners' brief.

SUMMARY OF ARGUMENT.

I.

The Supreme Court of Illinois correctly evaluated both state and national interests in holding invalid insofar as

applicable to interstate commerce the Illinois statutory provisions for 90-day and one-year suspensions of the right of motor carriers to operate on state highways, as punishment for prior violations of size and weight regulations. The invalidity of such provisions as applied to interstate common carriers holding certificates of public convenience and necessity from the Interstate Commerce Commission is particularly apparent because of their fundamental inconsistency with the primary objectives of the certificate provisions of Part II of the Interstate Commerce Act. As the legislative history shows, one of the major purposes of those provisions was to assure an appropriate balance between the supply of motor common carrier services and the actual public need for such services. In accordance with that philosophy the Interstate Commerce Commission has generally denied new certificates whenever it has appeared that existing carriers were providing adequate and satisfactory service. Conversely the Commission has firmly placed upon existing carriers the duty of providing reasonably adequate and continuous service.

The way is which enforcement of the Illinois suspension provisions would upset this delicately balanced federal system for equating the supply of, and demand for, transportation facilities is graphically illustrated in the present record. As applied to this respondent, for example, it would cause a complete cessation of the operations between Illinois and several other states of a significant and essential certificated common carrier upon whom many communities are solely dependent. Furthermore, such an interruption of operations would have so disastrous an effect upon respondent's organization that it might well be destroyed entirely as an effective link in the national transportation system which the federal statute is designed to protect and foster. This result would also be contrary to the entire spirit of the revocation provisions of Part

II of the Interstate Commerce Act which carefully define the method and grounds for suspension or revocation in such a way as to encourage the development and stability of certificated common carriers. The possibility of these effects being duplicated simultaneously in several different proceedings with respect to different carriers, as indicated in this record by the pendency of forty other similar proceedings, further demonstrates the incompatibility of the Illinois statute with the National Transportation Policy embodied in the Interstate Commerce Act.

There is nothing in the prior decisions of this Court which, even by remotest implication, casts any doubt upon the correctness of the conclusion of the Illinois Supreme Court. On the contrary, the opinions of this Court, in the most closely comparable cases, suggest that the denial of the use of state highways to interstate motor carriers as a sanction for prior violations of state law might well be unconstitutional, as an undue burden on interstate commerce, even in the absence of federal legislation, but in any event would certainly be invalid as applied to interstate operations conducted under a certificate of convenience and necessity issued by the Interstate Commerce Commission.

The reservation to the states, by the federal statute, of the power to prescribe size and weight limitations, does not militate, in any way, against the soundness of the foregoing conclusions. The Illinois Supreme Court correctly distinguished between the substantive power to prescribe such limitations, as recognized by previous decisions of this Court, and the power to enforce them by a particular sanction which involves both exclusion from interstate commerce and nullification of a federally granted right. The proper relationship between this federal right and prior violations of state highway regulations is illustrated by decisions of the Interstate Commerce Commission considering evidence of such violations as a relevant part of

the total picture in determining fitness in certificate proceedings. The State, on the other hand, has ample powers of enforcement, available in the usual sanctions of fines or imprisonment, as well as the additional power of excluding improperly loaded vehicles from the highways, without attempting to usurp the certificating functions of the Interstate Commerce Commission.

II.

There is no reasonable basis for the doubt which petitioners attempt to suggest with respect to the power of Congress to supersede the suspension provisions of the Illinois statute, as applied to interstate commerce. In several prior opinions this Court has assumed that Congress could go even farther, if it wished, and supersede entirely state size and weight regulations, as applied to interstate commerce, just as it has already done with respect to hours of service and standards of equipment. Despite petitioners' suggestion to the contrary, there is no question here of forcing the state to open its highways to interstate motor carrier traffic. The question is rather what conditions or forfeitures the state may validly impose upon interstate commerce which it has invited to use its highways. Since the forfeiture provided for by the Illinois law is plainly in conflict with a statute validly enacted by Congress, as Part II of the Interstate Commerce Act undoubtedly was, the state law must yield, in this particular, to superior federal power.

I.

THE SUPREME COURT OF ILLINOIS CORRECTLY HELD THAT THE ILLINOIS UNIFORM ACT REGULATING TRAFFIC ON THE HIGHWAYS, INSOFAR AS IT AUTHORIZES THE SUSPENSION OF THE RESPONDENT'S RIGHT TO ENGAGE IN INTERSTATE COMMERCE ON THE HIGHWAYS OF ILLINOIS, IS IN CONFLICT WITH AND SUPERSEDED BY PART II OF THE INTERSTATE COMMERCE ACT UNDER WHICH RESPONDENT HOLDS A CERTIFICATE OF CONVENIENCE AND NECESSITY AUTHORIZING SUCH OPERATIONS.

A. The Application of the Suspension Provisions of the Illinois Statute Would Vitiate the Primary Objectives of the Certificate Provisions of the Federal Statute.

The principles governing the determination as to whether a state statute must be held invalid on account of repugnance to a congressional enactment have so frequently been elaborated and applied by this Court that it would be both wearisome and fruitless to attempt any comprehensive statement of principles or analysis of authorities. For present purposes we can do no better than refer to the classic statement in *Savage* v. *Jones*, 225 U. S. 501, 533 (1912): "* * * when the question is whether a Federal act overrides a state law, the entire scheme of the statute must, of course, be considered, and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished —if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect— the state law must yield to the regulation of Congress within the sphere of its delegated power." It is true that in the *Savage* case the State statute was sustained, but less than a year later, in *McDermott* v. *Wisconsin*, 228 U. S. 115 (1913), this Court applied the same principles to invalidate a state law as inconsistent with the Federal Food and Drugs Act, saying: "* * * it is equally well settled

that the state may not, under the guise of exercising its police power or otherwise, impose burdens upon or discriminate against interstate commerce, nor may it enact legislation in conflict with the statutes of Congress passed for the regulation of the subject, and if it does, to the extent that the state law interferes with or frustrates the operation of the acts of Congress, its provisions must yield to the superior Federal power given to Congress by the Constitution" (228 U. S. at 131-132). It is with these guiding considerations in mind that we turn to a detailed analysis of the suspension provisions of the Illinois Uniform Act Regulating Traffic on the Highways and their relationship to the National Transportation Policy and the entire pattern of regulation embodied in Part II of the Interstate Commerce Act (originally enacted as the Federal Motor Carrier Act of 1935).

Chief Justice Schaefer, writing the unanimous opinion of the Illinois Supreme Court, succinctly summarized the fundamental grounds for holding the Illinois statute invalid insofar as it authorizes the suspension of respondent's right to engage in interstate commerce on the highways of the state, when he said: "But we do not see how an adequate national transportation system can be maintained if the comprehensive transportation network which it contemplates is to be subject to disruption by state suspension of operating rights for violation of load limits or other traffic regulations" (T. p. 61).

The practical wisdom of this remark is well illustrated by the facts shown in the record of this case. According to the unchallenged allegations of its complaint, respondent, in the conduct of its business as a common carrier, "operates 1929 motor vehicles and employs 2059 persons, of whom 736 are utilized both in interstate and intrastate commerce in its operations in Illinois" (T. p. 5). The respondent "conducts its operations under a certificate of public convenience and necessity issued by the Interstate

Commerce Commission * * * between various important and strategic points in the states of Illinois, Indiana, Iowa, Missouri, Kentucky, Tennessee, Ohio, Michigan, Pennsylvania and West Virginia" (T. p. 6). In the course of its business as a common carrier of property by motor vehicle, in both interstate and intrastate commerce, respondent "serves approximately 1035 cities, villages and communities in the state of Illinois, and 2500 cities, villages and communities in the other states in which it operates, some of which are solely dependent upon it for their common carrier service" (T. p. 6). Among other things, respondent "transports over the highways of Illinois, dangerous explosives for the United States Government * * * in furtherance of the defense effort" and "under contract with the U. S. Post Office Department, operates over the highways of the State of Illinois in its performance of a postal service, handling United States mail over various routes between, among other places, Sparta, Illinois and St. Louis, Missouri" (T. p. 6).

It is hardly necessary to remind this Court that a certificate of public convenience and necessity under Part II of the Interstate Commerce Act is issued only upon a finding that the carrier was "in bona fide operation as a common carrier by motor vehicle, on June 1, 1935" (49 U. S. C. § 306(a)(1)) or upon a finding "that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity" (49 U. S. C. § 307(a)). In view of the phenomenal growth of the motor carrier industry since the enactment of the Federal Motor Carrier Act in 1935,[1]

1. The increase in the motor carrier industry is amply illustrated by the following latetst available data:

	1939	1951
Reporting Carriers	957	1737
Total Assets	$133,916,746	$ 983,698,286
Total Operating Revenues	378,473,829	2,727,853,566
Total Expenses	359,784,771	2,603,324,762

it is apparent that the public need underlying the early grants of certificates of convenience and necessity has not only continued but has generally and substantially increased, and that the public interest is consequently bound to be seriously affected by any significant suspension of operating rights under such certificates. The overriding public interest in the availability of continuous service from holders of certificates of public convenience and necessity under the Interstate Commerce Act is also emphasized by the statutory provision making it "the duty of every common carrier of property by motor vehicle to provide safe and adequate service, equipment, and facilities for the transportation of property in interstate or foreign commerce" (49 U. S. C. § 316(b)) and authorizing the Commission to "establish reasonable requirements with respect to continuous and adequate service" (49 U. S. C. § 304(a)(1)). In its administration of the statute, the Interstate Commerce Commission has further emphasized and implemented these provisions by incorporating in every certificate the requirement that the "holder thereof shall render reasonably adequate and continuous service to the public in pursuance of the authority herein granted, and that failure so to do shall constitute sufficient grounds for suspension, change or revocation of this certificate." See e.g., *Pennsylvania Greyhound Lines, Inc.* v. *American Bus Lines, Inc.*, 54 M. C. C. 365 (1952). The authority for such revocation is made explicit by the provision of Section 212 of the Act to the effect that a certificate may be "suspended,

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Statistics of Class I Motor Carriers for 1939, Statement No. 4120, and Statistics of Class I Motor Carriers for 1951, Statement No. 5351, both published by the Interstate Commerce Commission based upon financial data supplied by motor carriers subject to its jurisdiction. The statistics include only Class I Motor Carriers operating predominantly in intercity service, which in 1939 included motor carriers with a gross revenue in excess of $100,000.00, and in 1951, motor carriers with a gross revenue in excess of $200,000.00. As can be seen, the foregoing data excludes all other segments of the motor carrier industry.

changed or revoked, in whole or in part, for willful failure to comply with any provision of this chapter, or with any lawful order, rule or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license" (49 U. S. C. § 312).

As stated in the declaration of the National Transportation Policy, set forth in the Act of September 18, 1940, amending the Interstate Commerce Act, the federal regulatory provisions are directed "to the end of developing, coordinating and preserving a national transportation system by water, highway and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense" (54 Stat. 899, 49 U. S. C. A., p. 5, Note). The basic philosophy underlying motor carrier regulation particularly, as expressed in the Senate Report recommending enactment of the Federal Motor Carrier Act of 1935 was that unrestrained competition "has been carried to an extreme which tends to undermine the financial stability of the carriers and jeopardizes the maintenance of transportation facilities and service appropriate to the needs of commerce and required in the public interest" (Sen. Report No. 482, 74th Congress, 1st Session (1935), p. 2).[2]

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2. Compare also the following statement of Commissioner Eastman, then Federal Coordinator of Transportation, in presenting the Motor Carrier Bill to the Senate Committee on Interstate Commerce:

> "The most important thing, I think, is the prevention of an over-supply of transportation; in other words, an over-supply which will sap and weaken the transportation system rather than strengthen it. In the case of railroads that was done in 1920 by the provision that prior to any new construction a certificate of convenience and necessity must be secured from the Commission. In my judgment it would have been much better if there had been such a provision many years before. It would have prevented certain railroad construction which tends to weaken the railroad system and situation at the present time. The States have, I think, in all cases, found the necessity in their regulation of motor transportation to

In accordance with that philosophy, the Interstate Commerce Commission has sought to administer its certificating authority under the statute so as to strike an appropriate balance between the needs of the shipping public for common carrier service and the available supply of such service through certificated operators. Thus, the Commission has repeatedly denied applications for new or extended operating rights on the ground that the existing carriers were able to provide adequate and efficient service. For example, in *Fisher Common Carrier Application—New Operation*, 30 M. C. C. 217, 222 (1941), in denying such an application, the Commission said:

> "We have consistently adhered to the view that existing carriers should normally be accorded the right to transport all traffic which they can handle adequately, efficiently, and economically in the territory served by them. * * * These carriers are expected to maintain regular service at all points on their routes, day in and day out, for the transportation of shipments in whatever quantity offered."

Similarly, in *Pine Tree Transport, Inc., Extension—Frozen and Canned Fruits*, 54 M. C. C. 669, 674-675 (1952), the Commission denied an extension application on the following basis:

> "In every proceeding of this type it is the burden of the applicant to prove that the motor carrier operation proffered is required by public convenience and necessity. If the evidence shows that service is already available between the points involved, it follows that inadequacy of such existing service must be shown. * * * Existing carriers have substantial investments in operating rights, facilities, and equipment necessary to institute and sustain their opera-

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provide for that prevention of an over-supply. It is a provision which has been adopted in most of the foreign countries that I have inquired into; in other words, the granting of certificates or permits in order to prevent an over-supply which weakens the situation." (Hearings on S. 1629, S. 1632, S. 1635, 74th Congress, 1st Session, Part I, page 78.)

tions, and they are entitled to all the traffic that they can handle adequately, efficiently, and economically in the territories which they serve without the competition of an additional service. In the absence of convincing evidence, therefore, of a clear-cut public need for applicant's proposed service which the more experienced and better-equipped existing carriers cannot or will not satisfy, we conclude that the application must be denied."

These and many other decisions[3] illustrate the zealousness of the Commission in attempting to equate the available supply of, and public need for, motor carrier facilities, in accordance with Congressional policy.

It is into this intricate and delicately balanced system for adjusting supply and demand in the field of motor common carrier services that the Illinois statute, to the extent that it authorizes the suspension of interstate operating rights, would thrust an alien and disruptive hand. The effect of such a suspension upon the service rendered by this respondent would be, as the Complaint alleges, that "the service which plaintiff, as a common carrier, is required to provide and perform for the general public under its interstate operating rights would be terminated not only at points in the State of Illinois, but also in fact in the various other cities and towns of other states which plaintiff serves in interstate commerce" (T. p. 9). As a concommitant effect the respondent "would be compelled to release a very substantial number of its experienced and

3. Other typical examples of this philosophy are the following: *H. A. Brewer, Extension of Operations—Packing House Products*, 48 M. C. C. 667 (1948); *Kenosha Auto Transport Corporation, Extension—Gadsden, Ala.*, 52 M. C. C. 123 (1950); *W. J. Halloran Trucking Co., Extension—Heavy Commodities*, 52 M. C. C. 749 (1951); *Walter C. Benson Co., Extension—New York, New Jersey and Pennsylvania*, 9 F. C. C. § 32,604 (1952); *Anton Vidas Contract Carrier Application*, 9 F. C. C. § 32,689 (1952); *Truckway Corporation, Extension—Florida*, 10 F. C. C. § 33,049 (1954); and *Diamond Transportation System, Inc., Extension—Burlington, Iowa*, 10 F. C. C. § 33,064 (1954).

valuable personnel, a large number of whom have been continuously employed for many years, full well knowing that such employees would necessarily have to be employed elsewhere, so that they would not return at a later date to plaintiff, or, in the alternative, plaintiff would be compelled to pay such employees even though they were not working" (T. p. 10). Furthermore, the continuation of such suspension for anything like the 90 days or one year period of suspension authorized by the Illinois statute, might well "cause financial ruin and bankruptcy to plaintiff because of its inability to provide and render service over the highways of Illinois," particularly since "approximately 62½ per cent of all plaintiff's operations in interstate commerce either originate at points in Illinois or are destined to points in Illinois, or must of necessity be handled in operations involving trips traversing the highways of the State of Illinois" (T. p. 10). In short, the effect of enforcement of the Illinois statute might well be, not merely to disrupt respondent's service for the period of the suspension order, but so completely to destroy its organization as to make it impossible for it ever to resume that service.

In this connection, it should, of course, be noted that the effect of such a suspension under the Illinois statute would be to supplant and nullify, in substantial part, the provisions of Section 212(a) of the Interstate Commerce Act relating to suspension and revocation of certificates. Both the provisions of this section and its administration by the Commission indicate the significance attributed by the National Transportation Policy to an interruption of service. With certain narrow exceptions, a certificate may be suspended, changed, or revoked by the Commission only after notice and hearing. Even after notice and hearing, a certificate may not be revoked by the Commission "unless the holder hereof wilfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Com-

mission, with a lawful order of the Commission, * * * commanding obedience to the provision of this chapter, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate found by the Commission to have been violated by such holder" (49 U. S. C. § 312(a)). The administration of this section by the Commission shows a keen regard for the serious effect of either suspension or revocation upon the interests of the certificate holder and upon the public interest in continued service. For example, in *Smith Bros., John C. Sandidge, Receiver, Revocation of Certificate*, 33 M. C. C. 465, 472 (1942), the Commisson said:

> "* * * In our opinion, the language of the foregoing section is clear and definite and unmistakably shows that Congress intended that a certificate, once effective, may be terminated by us only on the conditions, and according to the procedure, therein specifically provided. We may issue decision upon decision, and order upon order, on an application for a certificate so long as sufficient reason therefor appears and until all controversy is determined, but once a certificate, duly and regularly issued, becomes effective, our authority to terminate it is expressly marked off and limited. All the antecedent decisions and orders are essentially procedural in character, and may be set aside, modified, or vacated, but the certificate marks the end of the proceeding, just as the entry of a final judgment or decree marks the end of a court proceeding. To hold that under section 208 (a) we have the power to include in certificates self-executing forfeiture terms, conditions, or limitations would make section 212 (a) merely surplusage and would wipe out the stability and certainty with respect to operating rights of common carriers by motor vehicle required in the public interest and contemplated by the act. * * *"

Similarly, in *I. C. Black & Sons, Common Carrier Application*, 53 M. C. C. 572, 574-575 (1951), the Commission said:

> "* * * Although past unauthorized operations, and past failures to comply with our rules and regulations

> cannot be condoned, they do not, standing alone, constitute sufficient grounds for the revocation of certificates, nor, we think, for the refusal to reinstate them where such action appears otherwise justified. The act contemplates that certificates duly issued create a vested motor-carrier status in the holders which may not be taken away without giving such holders a reasonable opportunity to correct the faults giving rise to the revocation proceedings. It is not contemplated that revocation proceedings be utilized as a medium of punishment for past wrongdoing * * *".[4]

Of course, a suspension order under the Illinois statute is not in terms explicitly directed at the certificate granted by the Interstate Commerce Commission. But the substance of such an order is exactly the same as the suspension of a certificate insofar as the right of respondent to operate in interstate commerce over the highways of Illinois is concerned. The order must be directed at the entire business of the respondent insofar as that business is conducted in or through Illinois; it is not limited to the particular vehicles or drivers or shippers involved in the violations, and once issued it cannot be complied with in any way except by complete cessation of operations during the period of suspension. As the record shows, the effect of such a cessation may well be the complete ruin of the respondent, both as a business entity and as an effective instrumentality of interstate commerce. It was in reliance upon its certificate, and upon the assurance of the

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4. For other decisions to the effect that certificates will be revoked only through strict observance of Section 212(a) of the Interstate Commerce Act, see *Gregg Cartage & Storage Company, Common Carrier Application*, 21 M. C. C. 17 (1939); *Reinhardt Transfer Company—Purchase—Ray Lykins*, 38 M. C. C. 665 (1942); *Blackhawk Line, Incorporated (Joseph Kruger, Receiver) Revocation of Certificate*, 42 M. C. C. 58 (1943); *E. A. Christianson and Ruth Green, Revocation of Certificate*, 42 M. C. C. 238 (1943); *Joint Northeastern Motor Carrier Association, Inc.* v. *Jack Rose and M. Welloff, d/b/a Rose Transportation Company*, 43 M. C. C. 487 (1944); and *William S. Hickman, Revocation of Certificate*, 52 M. C. C. 201 (1950).

statute that the rights represented by the certificate could not be revoked except in the manner and for the reasons specified in the Federal statute, that the respondent invested the energy and capital necessary for the development of its far-flung organization. As the legislative history shows, it was exactly for the purpose of encouraging such investment and development, and so assuring the strength and stability of the motor carrier industry as an essential element of the national transportation system, that the certificate provisions of the Federal Motor Carrier Act were designed.[5] All this solicitude would be a mockery if State courts, enforcing such penalties as provided by the present Illinois statute, could accomplish exactly the same effect as an Interstate Commerce Commission order revoking or suspending a certificate.

It should also be recalled that the effect of a suspension of respondent's operating rights is merely one illustration

5. Compare the following statement in the Report of the Federal Coordinator of Transportation, 1934, recommending the passage of the Federal Motor Carrier Bill:

> "It is likely that regulation of the kind proposed will somewhat lessen the flexibility of truck operations and set up requirements which small or poorly financed operators will not be able to meet. But it should confer benefits on the trucking industry which will more than compensate for these losses, by promoting a more orderly conduct of the business, lessening irresponsible competition and undue internal strife, encouraging the organization of stronger units, and otherwise enabling the industry to put itself on a sounder and more generally profitable basis. It will also enable the common carrier to strive more effectively for his share of the business, through proper recognition of the greater responsibility which he assumes and by reducing the number of pseudo-contract operations, which in the past have sought the more profitable business, leaving to the common carrier more generally the small freight and the responsibility of furnishing scheduled service the year around. It will also tend to reduce the friction which now exists by reason of conflicting State laws and regulations. The ultimate effect may, in fact, be a degree of improvement in the conduct and effectiveness of the business which will surprise certain of the ardent proponents of regulation." (Senate Document 152, 73rd Congress, 2nd Session, page 33.)

of the disruptive effect upon the national transportation system inherent in the application of these Illinois statutory provisions. As this record shows, at the time of the institution of these proceedings, there were already pending in various Circuit courts of Illinois, approximately forty other complaints seeking the suspension of motor common carrier operating rights for periods of ninety days each (T. p. 11). The Illinois statute does not provide for, nor contemplate, any weighing by the enforcing court of the harmful effects upon the public interest in general, and upon interstate commerce in particular, of the suspension of operating rights; and, as a practical matter, it is difficult to conceive how a trial court in Illinois, in any particular proceeding, divorced from the whole scheme of federal regulation, could sensibly appraise the ultimate effects upon interstate commerce of the interruption of any individual operator's ability to traverse the highways of Illinois in the course of serving such commerce. But even more apparent is the complete impossibility of appraising, in any one enforcement proceeding, the cumulative effect upon interstate commerce of numerous proceedings in different courts involving the suspension of different operating rights. Yet the cumulative effect of such proceedings, culminating in any significant number of suspensions, would surely be to create havoc in the national transportation system which the Interstate Commerce Act is designed to protect and foster.

It would be surprising indeed to find as petitioners somewhat halfheartedly suggest, that this Court has ever sustained such a direct invasion of federal right or given sanction to a state statute so fundamentally in conflict with applicable federal law. There is indeed no decision of this Court which lends even the color of support to such a suggestion. Petitioners' brief refers somewhat cryptically to *Welch Co.* v. *New Hampshire*, 306 U. S. 79 (1939), as "most nearly analogous to the present question" (Brief,

p. 16). Examination of the facts of that case, particularly of the opinions below and the record and briefs in this Court, discloses the crucial difference that it involved no attempt by the state to suspend the right to operate solely in interstate commerce. On the contrary, the order of the New Hampshire Public Service Commission there under attack was explicitly limited to the suspension of "any and all registration certificates issued by this Commission, permitting the H. P. Welch Company to lawfully *transport property* for hire in motor vehicles *between points within this State*" (emphasis supplied) (See Transcript of Record in this Court, p. 24; also 89 N. H. 428 at 429 (1938)). From the briefs filed in this Court, it is apparent that both parties interpreted this to mean that New Hampshire had not undertaken to forbid appellant the use of its roads while engaged solely in interstate commerce. In the Statement Opposing Jurisdiction, the Attorney General of the State of New Hampshire said: "The right of appellants to carry on an interstate business has not been restricted by the State except as the regulation of its intrastate operations may touch and affect appellant's interstate business" (p. 2). With respect to this aspect of the case, the appellant's contention was simply that its operations were predominantly interstate, and its interstate and intrastate operations so commingled, that the application to such operations of the substantive provisions of the State law, establishing maximum hours for continuous driving on the state highways, was inconsistent with and superseded by the authority granted by Congress to the Interstate Commerce Commission to establish maximum hours for employees engaged in interstate commerce (see Brief for Appellant, pp. 13-14). It was within the framework of the contentions thus presented, that this Court formulated, and answered in the negative, "the sole question * * * whether Congress intended that from the time of the federal enactment until effective action by the Com-

mission, there should be no regulation of periods of continuous operation by drivers of motor vehicles hauling in interstate commerce" (306 U. S. at 54). It does not appear from the record in the *Welch* case whether the petitioner was operating under a certificate granted by the Interstate Commerce Commission, but that fact was immaterial since there was no suggestion that the effect of suspension of the state certificate was to prohibit the petitioner from operating solely in interstate commerce.

In *Eichholz* v. *Public Service Commission of Missouri*, 306 U. S. 268 (1939), on the other hand, the State statute did provide that it should be unlawful to use any highways of the state without a permit from the Commission, and it was this permit which was revoked for failure to observe its conditions, namely, not to engage in intrastate commerce. However, as Chief Justice Hughes said: "Appellant's complaint did not attack these statutes; on the contrary, he asserted that he had fully complied with their provisions. His complaint was of the order of the Commission revoking his permit. We confine ourselves to the question thus presented" (306 U. S. at 272-273). But even more important for present purposes was the next comment of the Chief Justice: "When the Commission revoked the permit, the Interstate Commerce Commission had not acted upon appellant's application under the Federal Motor Carrier Act and meanwhile the authority of the state body to take appropriate action under the state law to enforce reasonable regulations of traffic upon the state highways had not been superseded" (306 U. S. at 273). And finally, with respect to the particular contention of the appellant that the transportation in which he had engaged was truly interstate and not, as the State Commission had found, "a plain subterfuge and a fraud" (Transcript in this Court, p. 30), in that he had unlawfully engaged in intrastate business under the pretense of transacting interstate business, the Chief Justice was careful

to say: "* * * If appellant's hauling of the merchandise in question across the state line was not in good faith but was a mere subterfuge to evade the State's requirement as to intrastate commerce, there is no ground for saying that the *prohibition of the use of the interstate permit to cover such transactions*, and the application of the Commission's rule prohibiting them in the absence of an intrastate certificate, was an unwarrantable intrusion into the federal field or the subjection of interstate commerce to any unlawful restraint * * * The ultimate question is thus one of fact, whether the transactions of appellant were of the character described by the Commission and in the findings of the District Court" (306 U. S. at 274-275 (Ital. supplied)). Thus the Chief Justice expressly limited the effect of the holding to sustaining the right of the state to prevent an interstate certificate from being used as a cover for intrastate operations. In the light of these passages, it is apparent that Chief Justice Hughes was particularly concerned that the decision should not be interpreted as a broad holding to the effect that the state could validly prohibit truly interstate operations as a sanction for violation of state law, and even more concerned to preserve the proposition that the grant of the federal certificate to engage in interstate commerce might well override any such state prohibition.[6]

It is also instructive to compare the present problem with that presented in *Fry Roofing Co.* v. *Wood*, 344 U. S. 157 (1952), in which this Court, by a five to four vote, sustained the application of an Arkansas statute requiring the issuance of a permit by the State Public Service Commission as a condition to engaging "in the business of

6. The Supreme Court of Texas, in *Railroad Commission of Texas* v. *Querner*, 150 Tex. 490, 242 S. W. 2d 166 (1951), gave effect to this reservation in the Chief Justice's opinion in the *Eichholz* case when it held, in a similar situation, that the rights of a motor carrier holding a federal certificate to operate in interstate commerce over state highways could not be revoked as a sanction for violation of state law.

a contract carrier by motor vehicle over any public highway in this state." In rejecting the dual contention that this regulation, as applied to interstate operations, would "unduly burden interstate commerce in violation of the United States Constitution and would invade a field of regulation preempted by the Federal Motor Carrier Act," the opinion of this Court carefully delimited the scope of the holding in the following language:

> "* * * And the State Commission here expressly disclaims any 'discretionary right to refuse to grant a permit for contract carriage where that carriage is in interstate commerce.' The state asserts no power or purpose to require the drivers to do more than register with the appropriate agency. * * * Here neither petitioner nor the drivers have obtained any kind of authority from the Interstate Commerce Commission. Indeed, petitioner's whole case has been built on the premise that neither it nor the drivers must get a permit from the state or the national regulatory agency. In this situation our prior cases make clear that a state can regulate so long as no undue burden is imposed on interstate commerce, and that a mere requirement for a permit is not such a burden. It will be time enough to consider apprehended burdensome conditions when and if the state attempts to impose and enforce them. At present we hold only that Arkansas is not powerless to require interstate motor carriers to identify themselves as users of that state's highways" (344 U. S. at 161-163).

Examination of the foregoing cases thus reveals that in each there were at least two significant points of distinction from the present problem. In the first place, in none was there any issue presented with respect to the nullification of either a certificate or permit from the Interstate Commerce Commission. In the second place, it is also apparent that this Court carefully avoided any implication that a State, entirely apart from the Federal statute, might properly claim the right to deny the use of its high-

ways to interstate motor carriers as a sanction for prior violations of state law. Yet it is the very essence of the Illinois statute that prior violations are the basis for imposing such a sanction. Consequently, even in the absence of a controlling federal statute, there is good reason to believe, under the prior decisions of this Court, that the effect of the Illinois statute is to impose an undue and unconstitutional burden on interstate commerce. For present purposes, however, it is unnecessary to explore this particular issue further. Here there unquestionably is a controlling federal statute with respect to which it may aptly be said, in the language of the *Savage* case, that "its operation within its chosen field must be frustrated and its provisions be refused their natural effect," if Illinois be permitted to suspend, as a sanction for prior violations of state law, the right of a certificated common carrier to operate in interstate commerce over the highways of the state.

B. The Exercise of the Suspension Power Is Not a Necessary or Appropriate Adjunct of the Power Reserved to the States by the Federal Statute to Prescribe Size and Weight Limitations for Motor Carriers.

Without even attempting to come to grips with the foregoing analysis, upon which the decision of the Illinois Supreme Court under review is predicated, petitioners nevertheless suggest that there is some inconsistency between that decision and the decisions of this Court in *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177 (1938), and *Maurer* v. *Hamilton*, 309 U. S. 598 (1940), upholding state authority to establish size and weight limitations applicable to motor carriers operating on state highways in interstate commerce. This suggestion blandly ignores the distinction carefully drawn by the Illinois Supreme Court between the state's power, on the one

hand, to establish such substantive regulations, and to enforce them by the usual civil or criminal penalties, including fines or imprisonment, and the authority of the state, on the other, to impose as a sanction, the nullification of the federally granted right of the business enterprise to operate in interstate commerce. There is, of course, as this Court has recognized, a delicate relationship between the state's interest in the preservation of its roads and the federal regulation of interstate motor carrier operations. Since Congress has not specified, nor authorized the Interstate Commerce Commission to specify, regulations with respect to sizes or weights of motor carriers, this Court has concluded that the state is free, within the bounds of reason, to impose such limitations as it considers proper. In the event of violation, not only may the state impose fines and imprisonment, as did the statutes involved in the *Barnwell* and *Maurer* cases, but it may also presumably stop and prevent from continuing on the highway any motor vehicle which it finds not to be in compliance (Compare Section 229(b) of Illinois Rev. Stats., Ch. 95½, Appendix p. 42). However, when the state takes the additional step taken here, of undertaking to suspend the right of the business entity to conduct operations over the highways of the state because of past violations, it attempts to exact as a penalty the virtual surrender of a federal right, which, as elaborated above, serves not only the interest of the holder himself, but also a much broader public interest within the purview of the federal statute. There is not the slightest hint, either in the previous opinions of this Court, or in the legislative history of the Federal Motor Carrier Act, that the possibility of such a penalty being applicable to interstate carriers even occurred to the sponsors of the federal legislation. The statement of Commissioner Eastman, quoted in the opinion of this Court in *Maurer* v. *Hamilton*, and in the petitioners' brief, refers to the right of the state "to protect the high

ways against unsafe or unreasonable use," but neither the statement itself, nor the context, carry any implication that the federally granted right to operate in interstate commerce might be substantially nullified on account of prior violations of state law.[7]

The Illinois Supreme Court also appropriately distinguished the decision of the Virginia Supreme Court in *Joyner* v. *Matthews*, 193 Va. 10, 68 S. E. 2d 127 (1951), upholding a state statute which denied the use of the state's highways to motor carrier operators in default in payments imposed on account of violations of weight regulations. There the operators contended that because they themselves, as distinguished from their drivers, had not been convicted of violating the statutory load limits, they could not be subjected to such payments nor could their right to operate on the highways of the state be suspended. The Virginia Supreme Court held that the owners of the motor carriers could properly be made responsible for their drivers' violations and that they could be denied the use of the highways so long as they were in default in the statutory payments. The Court was also careful to state, of the operator's position, "So long as the violation is paid for at the rate fixed * * * he can continue to operate"

7. How far any such thought was from Commissioner Eastman's mind is shown by the statement made by him a few minutes later in the hearings, when he said: "This is the situation as I understand it. A State now has power to grant certificates of operation covering intrastate service. It does not have any power to regulate interstate operations. Therefore, if a bus operator to whom they have not given a certificate for intrastate operation comes into the State and engages in interstate service, they cannot and do not prevent him from operating, but they do say that he shall not engage in intrastate service without a certificate from the State, and they prevent him from engaging in such service. Under this bill it would be the interstate Commerce Commission which would grant the certificate for interstate operations, but that would only cover interstate operations; and I do not think that operator, even if he had a certificate from the Interstate Commerce Commission, could engage in intrastate operations without authority from the State." (Hearings on S. 1629, S. 1632, S. 1633, 74th Congress, 1st Session, Part 1, page 93.)

(193 Va. at p. 15, 68 S. E. 2d at 131). It may be assumed for present purposes, that an operator who refuses to make payments validly imposed by the state as a prerequisite to the use of the highways, such as the usual license tax or registration fees, or the special payments required in the *Joyner* case, may be denied the use of the highways so long as he persists in that refusal, just as a truck found to be operating in violation of weight or size limitations might be stopped and excluded from the highways until the violation is corrected. See too, *Aero Mayflower Transit Co.* v. *Board of Railroad Commissioners*, 332 U. S. 495 (1947); *Capitol Greyhound Lines* v. *Brice*, 339 U. S. 542 (1950). However, this is a far different thing from saying that the holder of a certificate to operate under the federal law may be denied, for an arbitrary period, the use of the state highways in interstate commerce because of prior violations of state laws, irrespective of whether such violations be characterized as "habitual" or by any other vaguely derogatory formula.

The proper relationship between prior violations of state size and weight regulations and the federal right to operate in interstate commerce is indicated by the Interstate Commerce Commission's consideration of such violations in passing upon applications for certificates of public convenience and necessity under Section 207(a) of Part II of the Interstate Commerce Act (49 U. S. C. § 307(a)). In such proceedings, the Commission has repeatedly recognized the relevance of evidence of violations of state highway regulations as bearing on the question of fitness to operate. For example, in *Southwest Freight Lines, Inc., Extension—Glass Product*, 54 M. C. C. 205, 219 (1952), after considering evidence that the applicant had violated the law of Missouri with respect to overloading, the Commission said:

> "We are convinced that since the finding against it in the State proceeding, applicant has taken such cor-

rective action as to demonstrate its willingness, ability, and desire to comply with all applicable requirements both State and Federal * * *

"Since the issuance of the report in the intrastate proceeding against applicant, some violations of the Missouri laws or regulations are admitted, but there is no evidence that the violations were willfully committed. On the contrary, it is clear that applicant makes extensive efforts to comply not only with Missouri laws, rules, and regulations, but also those of other jurisdictions, and it fairly appears that some violations are unavoidable on account of the shifting of loads or other causes * * * In our opinion, the evidence presented on further hearing does not warrant a finding that applicant is unfit or unable properly to perform operations in interstate commerce."

Similarly, in *Hayes Freight Lines, Inc., Extension—Alternate Routes in Michigan*, 54 M. C. C. 643, 649-650 (1952), after considering evidence of overweight violations, principally in Illinois, the Commission said:

"In considering the question of applicant's fitness, we are impressed with the obvious fact that the evidence as a whole is preponderantly in applicant's favor. There is no appreciable evidence in refutation of applicant's averment that it is in good regulatory standing in Michigan, Ohio, and Indiana. In all respects, applicant has a good or comparatively good record in Kentucky; and, viewed in the light of the evidence submitted in applicant's behalf, the relatively few violations in that State require no further consideration. Except for overweight violations, applicant has a good record in Illinois; and, as noted, these were axle overweights rather than excess gross tonnage violations. There is plausibility, and possibly some merit, in applicant's contention that some of these violations were due to the shifting of cargo in transit; and the same must be said of applicant's allegation that there is often a substantial variance in weight results between different scales. But what is perhaps more important is the fact that applicant has been making sincere and practical efforts to avoid or

> reduce these violations, and that its efforts have been progressively successful * * * In all the circumstances, we must conclude, as the joint board did, that applicant is fit and able, financially and otherwise, properly to conduct the operation herein authorized."

The unreported case of *Hall Freight Lines, Inc.—Extension—Alternate Route*, MC-9942, Sub No. 7, decided by the Commission (in December, 1953), is another example of the Commission's concern with the problem of state weight violations in relation to a carrier's fitness to perform a proposed operation. In that case, Hall Freight Lines, Inc. sought alternate route authority and the Joint Board had approved the grant. Subsequently, however, the case was reopened solely to inquire into the applicant's fitness. The Joint Board then held that in view of the applicant's overload violation record, it was unfit to perform the proposed operation, and therefore recommended the denial of the application. However, on further hearing, the Joint Board found applicant fit, and in affirming the Joint Board's ruling, the Commission said:

> "We do not agree that the joint board overlooked or disregarded State law overweight violations. Its report shows that this matter has been thoroughly considered. While we agree with rail carrier protestants that it is against public policy and the law to operate overweight trucks, we also believe that applicant has the right to explain the nature and extent of any overweight violations. The joint board was justified in taking this factor into consideration and also in giving consideration to the effort and progress which applicant has made in overcoming its shortcomings in this respect."

It is apparent from the above passages that the Commission gives serious consideration to evidence of violation of state highway regulations, including specifically weight regulations such as those here involved, in deter-

mining whether to grant or to extend operating rights.[8] It is also apparent that the Commission considers such violations in the context of the applicant's entire operations in determining its fitness to operate from the point of view of the public interest. Thus, even if a suspension order under the Illinois statute could be twisted into a determination that, by prior violations, the operator had demonstrated inability or unwillingness to comply in the future with state regulations, such a determination would plainly be an attempt to usurp the authority of the Interstate Commerce Commission to determine fitness in passing on the qualifications of applicants for new certificates

8. The *Southwest*, *Hayes* and *Hall* cases all indicate, aside from the question of a relationship between state weight violations and a carrier's fitness to perform a proposed operation, that the Commission will inquire, in each proceeding, into the fitness of carriers seeking additional operating rights. This principle is succinctly stated in *Joseph P. Tripoli-Extension-Brick*, 53 M. C. C. 212, 214-215 (1951), wherein the Commission said:

> "Applicant points out, in his first argument, that he now holds a certificate and he contends that, from this fact alone, it should be assumed that he is fit to conduct the proposed operation. This contention is clearly without merit. Section 207(a) of the Act provides that we may issue a certificate authorizing a proposed operation only if the applicant is found to be fit, willing and able properly to perform the proposed service and to conform to the provisions of Part II of the Act and our rules and regulations thereunder. It is well settled that an applicant must establish his fitness to conduct a proposed interstate operation regardless of whether or not he had previously been found fit to conduct other operations and been granted a certificate authorizing such operations. See for example, *Lieberman Extension of Operations—Michigan*, 48 M. C. C. 399, 402."

Examination of the records of the Interstate Commerce Commission will disclose that since only October 21, 1949, this respondent, Hayes Freight Lines, Inc., under Docket No. MC-42329 and sub-numbers thereunder, has been granted additional operating rights in 23 separate proceedings, in each of which it has been determined to be "fit, willing and able properly to perform the service proposed."

under Section 207, as well as to determine grounds of revocation under Section 212.[9]

If it were indeed true that suspension provisions such as those enacted by Illinois were the only effective means of enforcing state laws governing the permissible size or weight of motor carriers using the highways, there might be more reason for this Court to overlook or minimize the obvious conflict between this penalty provision and the entire policy and pattern of Part II of the Interstate Commerce Act. In this connection, petitioners, without the slightest support in the record, cavalierly suggest that the "imposition of fines is no deterrent to overloading of motor vehicles" because the "pecuniary exaction is merely one more cost of doing business passed on to the shipper" (Brief, p. 15). To appreciate the complete falsity, as a matter of fact, of the assumptions underlying this argument, one need only turn to the opinions of the Interstate Commerce Commission in the proceedings already referred to, involving the fitness of applicants for certificates of convenience and necessity, where the Commission summarizes the tremendous outlays of energy and expense made by this respondent and other operators, in striving to achieve complete compliance with state weight regulations. But irrespective of this fact, it challenges common sense to suggest that the state could not impose penalties, in the form of fines, or prison sentences, sufficiently heavy

9 The Commission presently has in effect the following regulation:

> "Every motor vehicle shall be driven in accordance with the laws, ordinances, and regulations of the jurisdiction in which it is being operated, unless such laws, ordinances and regulations are at variance with specific regulations of this Commission which impose a greater affirmative obligation or restraint." (Sec. 192.3 contained in I. C. C. Order April 14, 1952, effective July 1, 1952, 17 F. R. 4427.)

It is evident that under Section 212 of the Interstate Commerce Act, the persistent violation of the foregoing regulation would provide the basis for revocation or suspension proceedings. If it were deemed advisable, the Commission could make similar provision regarding compliance with state size and weight regulations.

to exact the fullest measure of compliance that is humanly possible under the circumstances. Similarly, with respect to the particular emphasis placed by the brief of the American Automobile Association, *amicus curiae*, on the importance of individual axle overloads as a detriment to the highways, it should be noted that such overloading can be of no possible economic benefit to the motor carrier, since it does not in any way increase his revenues or decrease his costs.[10] It is, therefore, hardly conceivable that the threat of fines, or imprisonment, or simply the inconvenience and delay occasioned by the exclusion of particular vehicles from the highways until reloaded in accordance with specifications, would not provide sufficient incentive to cause motor carrier operators to use all practicable precautions in attempting to comply with individual axle weight requirements. Finally, perhaps the best evidence of the lack of any real need for this type of suspension sanction is the fact that, in addition to Illinois, there appears to be only one other state (Indiana) which has felt called upon to experiment with it.[11] All these factors lend additional support to the unanimous judgment of the Supreme Court of Illinois, which is certainly peculiarly sensitive to the interests of the state in the preservation of its highways. Compare *Bode* v. *Barrett*, 412 Ill. 204, 321 (1952), aff'd, 344 U. S. 583 (1953).

For all the foregoing reasons we submit that the Supreme Court of Illinois correctly evaluated both state and national

10. In this connection it is enlightening to note that out of the 157 alleged violations which form the basis of the complaint pending against respondent in the Circuit Court of Marion County, Illinois, only two resulted from gross overloads as distinguished from axle overloads (T. pp. 4, 5). Thus, it is apparent that insofar as respondent's individual case illustrates the general enforcement problem, there is no basis for inferring a deliberate intention on the part of motor carrier operators to countenance violations as an economically preferable alternative to compliance.

11. For a complete analysis of comparable state statutes, see Appendix C, *infra*.

interests in concluding that the suspension provisions of the Illinois statute as applied to interstate commerce are in fundamental conflict with the National Transportation Policy embodied in Part II of the Interstate Commerce Act.

II.

THERE IS NO REASONABLE DOUBT AS TO THE CONSTITUTIONAL POWER OF CONGRESS TO SUPERSEDE THE ILLINOIS STATUTE INSOFAR AS THE LATTER WOULD SUSPEND THE RIGHT OF CERTIFICATED CARRIERS TO ENGAGE IN INTERSTATE COMMERCE ON THE HIGHWAYS OF THE STATE

Petitioners attempt to present a constitutional doubt with respect to the power of Congress to supersede the suspension provisions of the Illinois statute by suggesting that "This Court has never held that the Commerce Clause empowered the Federal government to take over without compensation property of the state" (Brief for the Petitioners, pp. 8-9). Of course, the holding of the Illinois Supreme Court implies nothing with respect to the power of Congress to take the property of Illinois without compensation. If petitioners' suggestion has any application to the present problem, the contention apparently is that the state may, if it wishes, prevent its property in general, and therefore its roads in particular, from being used for the purposes of interstate commerce.[12]

12 To support the rather nebulous proposition that "State property is not subject to the restraints of the Commerce Clause" (Brief, p. 9), petitioners cite such cases as *Geer v. Connecticut*, 161 U. S. 519 (1896), holding that a state could, without violating the Commerce Clause, prohibit wild game shot within the state from being taken outside the state; *Hudson County Water Co. v. McCarter*, 209 U. S. 349 (1908), that a state could prevent the diversion of state waters to uses outside the state; and *Rayonier Fish Flour Co. v. Gentry*, 297 U. S. 422 (1936), that a state could prohibit sardines caught within the state, or brought into the state in a fresh condition, from being manufactured into fish flour. With at least as much relevance, petitioners might also have cited *Foster-Fountain Packing Company v. Haydel*, 278 U. S. 1 (1928), holding invalid, as a burden on interstate commerce, a state statute prohibiting shrimp taken from the waters of the

Whether the state could indeed deny the use of its roads to interstate commerce, while opening them to the same kind of intrastate commerce, without unconstitutionally discriminating against interstate commerce, is an interesting question which need not be explored for present purposes. Neither is any question presented here of the right of Illinois to build and maintain highways from which commercial motor vehicles operating in both interstate and intrastate commerce are excluded. Illinois, like other states, invites interstate motor carriers to make use of its highways, and it is upon the basis of that invitation, and the availability of the state highways for the needs of interstate commerce, as well as those of national defense and the postal service, that the national government makes substantial contributions to the cost of the state highways systems. See *Nashville, Chattanooga & St. L. Ry.* v. *Walters*, 294 U. S. 405, 417 (1935); *Maurer* v. *Hamilton*, 309 U. S. 598, 604 (1940).[13] The question here is

state from being exported out of the state if the shell, or hull at least, had not been removed. Furthermore, the limited scope of decisions dealing with game, fish, and water may be deduced from the refusal of this Court to apply the same principles to natural gas. *Pennsylvania* v. *West Virginia*, 262 U. S. 553 (1923).

If some helpful principle may be drawn from these cases dealing with certain natural resources of the state, it would seem to be that while a state may keep certain resources at home for consumption within the state, once it permits them to be used for purposes of interstate commerce, no undue burdens may be placed upon such commerce. But as stated in the text, the entire application of the first part of that proposition to state highways is at least doubtful, particularly so when there is a controlling federal statute involved.

13. The background of Federal-aid highway legislation indicates the understanding of the Federal government regarding the permissible uses of state highways. As stated in the opinion of this Court in *Nashville, C. & St. L. Ry.* v. *Walters*, 294 U. S. 405, 417-418 (1935):

> "• • • The aim of that legislation is 'a connected system of roads for the whole Nation;' 'to provide complete and economical highway transport throughout the Nation;' to furnish 'a new means of transportation, no less important to the country as a whole than that offered by the railroads;' to establish 'lines of motor traffic in interstate commerce.' The immediate interest of the Federal Government is, in part, the national defense as well as the transportation of the mails."

simply what conditions and what forfeitures Illinois may constitutionally place upon interstate motor carriers using its highways in the light of the fact that it has voluntarily opened such highways to interstate motor carrier traffic.

It should hardly be necessary, at this late date, to elaborate the proposition that a privilege within the power of a state to grant or withhold may nevertheless not be made subject to unconstitutional conditions. *Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1 (1910). And if the state has a special proprietary interest in its highways, that interest does not remove the conditions which the state places upon their use from constitutional scrutiny, irrespective of whether the conditions are applicable to interstate commerce or intrastate commerce, or both. This has certainly been the assumption underlying the opinions of this Court in every case in which state highway limitations were under constitutional attack. If the state's power to condition the use of its highways were indeed subject to no constitutional restrictions, there would have been no justification for decisions such as *Buck* v. *Kuykendall*, 267 U. S. 307 (1935), and *Bush & Sons Co.* v. *Maloy*, 267 U. S. 317 (1925), holding invalid the requirement of state certificates of public convenience and necessity from interstate motor carriers. Furthermore, in considering the validity of state size and weight regulations as applied to interstate carriers, even in the absence of any applicable federal regulation, this Court did not assume the state's power was unlimited, but rather defined its inquiry as being one "to ascertain upon the whole record whether it is possible to say that the legislative choice is without rational basis." See *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 191-192.

If state highway regulations may be invalidated on account of conflict with the Commerce Clause unaided by federal legislation, they may certainly be invalidated on account of fundamental repugnance to federal legislation

enacted under the Commerce Clause. So far as the regulation of hours of service, authorized by Section 204 of the Federal Motor Carrier Act was concerned, Mr. Justice Butler seemed unaware of any constitutional difficulty when he said, in *Welch Co.* v. *New Hampshire*, 306 U. S. 79, 84 (1939): "Without so deciding, we assume, so far as concerns the periods of continuous service condemned by the state commission, that when the federal regulations take effect they will operate to supersede the challenged provisions of the state statute." Such was indeed the effect generally recognized after the federal regulations did become effective. See *Public Service Commission* v. *H. P. Welch Co.*, 91 N. H. 328, 18 A. 2d 826 (1941).[14] So too in *Maurer* v. *Hamilton*, 309 U. S. 598, 610, this Court engaged in an elaborate examination to determine "whether the Pennsylvania statute is a regulation of 'size and weight' within the meaning of Section 225, or whether it is a "regulation of 'safety of operation and equipment' which the Commission was authorized to make by section 204 (1) (2)." The assumption plainly was that if it were the latter, the state statute would have been superseded by federal regulation. It is difficult to conceive of any reason why the constitutional power of Congress should

14. The same lack of difficulty found by the Court in dealing with the supersedure of state hours of service regulation, as exemplified by the second *Welch* case, is also notable with respect to the supersedure of state insurance requirements. Thus, in *Pennsylvania Greyhound Lines, Inc.* v. *Board of Public Utility Commissioners, et al.*, 107 F. Supp. 521 (1952), the Court held that an order of the Interstate Commerce Commission authorizing plaintiff to be a self-insurer superseded the demand of the New Jersey Board of Public Utility Commissioners for plaintiff to carry insurance. See also *University Overland Express* v. *Griffin*, 89 N. H. 395 (1938); *University Overland Express* v. *Alsop*, 122 Conn. 275 (1936). A similar conclusion is reached in an opinion by the Attorney General of New York dated April 21, 1949, and in an opinion by the Attorney General of Utah dated April 19, 1950, both of which are referred to in footnote 3, page 529 of the *Pennsylvania Greyhound Lines, Inc.* opinion, *supra*.

be any greater to supersede one type of regulation than the other.[15]

Finally, even if there still were any room for doubt as to the constitutional power of Congress to supersede entirely the substantive provisions of state size and weight regulations as applied to interstate commerce, the same doubt would not be applicable to the partial supersedure found by the Illinois Supreme Court with respect to only the suspension provisions of the Illinois statute. In any realistic sense, this supersedure involves a much less drastic interference with state power, since it simply removes from the state's enforcement arsenal a particular sanction. Furthermore, that particular sanction is aimed directly at the heart of the federal system of regulation, the issuance of certificates of public convenience and necessity, and tends to frustrate the basic objectives of that system. If anything is plain from an examination of the decisions of this Court on questions involving supersedure of state statutes by federal statutes, it is that when the effect of a state statute is to frustrate fundamental ob-

15. It is true that Commissioner Eastman, in his statement before the Senate Committee in 1935, indicated some doubt as to whether the Federal Government had the authority to supersede State regulations dealing with sizes and weights of motor vehicles using state highways. Subsequently, however, in the report submitted by the Interstate Commerce Commission, pursuant to Section 225 of the Interstate Commerce Act (49 U. S. C. § 325), on the question of need for federal regulation of the sizes and weights of motor vehicles, the Commission, Mr. Eastman, then acting as chairman, concluded:

> "The Supreme Court decisions reviewed above, particularly *Hendrick* v. *Maryland*, *Morris* v. *Duby*, *Sproles* v. *Binford*, *S. C. Hwy. Dept.* v. *Barnwell Bros.*, and *Maurer* v. *Hamilton*, seem clearly to recognize that Congress possesses power to regulate, at least to some extent, the sizes and weights of motor vehicles in interstate commerce, and that, should Congress exercise this power, its regulations would supersede State regulations of the same nature, insofar as interstate commerce is concerned, despite State ownership of the highways and the possession of large police power by the States in respect of conservation of and safety upon their highways." (House Document 354, 77th Congress, 1st Session, page 709.)

jectives of a federal statute, the state law must fall, even if the subject matter would otherwise be within the police powers of the state. *McDermott* v. *Wisconsin*, 228 U. S. 115 (1913); *Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 148 (1942); *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America* v. *Wisconsin Employment Relations Board*, 340 U. S. 383 (1951). In the present case, the Illinois statute, in this narrow particular of the suspension procedure as applied to interstate commerce, would certainly frustrate some of the fundamental purposes of Part II of the Interstate Commerce Act. Because it would have that effect, the Illinois statute, in this particular, must yield to superior federal power.

CONCLUSION.

We therefore request that the judgment of the Supreme Court of Illinois, insofar as it is challenged by petitioners in this proceeding, be affirmed.

Respectfully submitted,

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APPENDIX "A".

Excerpts from Part II of the Interstate Commerce Act, 49 U. S. C.

§ 306(a) (1): "Except as otherwise provided in this section and in section 310a of this title, no common carrier by motor vehicle subject to the provisions of this chapter shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided*, however, That, subject to section 310 of this title, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate was made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after October 1, 1935, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered

in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 307(a) of this title and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful."

§ 312 (a): "Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this chapter, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: *Provided*, however, That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commissin, made as provided in section 304(c) of this title, commanding obedience to the provision of this chapter, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder: *And provided further*, That the right to engage in transportation in interstate or foreign commerce by virtue of any certificate, permit, license, or any application filed pursuant to the provisions of sections 306, 309, or 311 of this title, or by virtue of the second proviso of section 306(a) of this title or temporary authority under

section 310a of this title, may be suspended by the Commission, upon reasonable notice of not less than fifteen days to the carrier or broker, but without hearing or other proceedings, for failure to comply, and until compliance, with the provisions of sections 311(c), 317(a), or 318(a) of this title or with any lawful order, rule, or regulation of the Commission promulgated thereunder."

§ 316(b): "It shall be the duty of every common carrier of property by motor vehicle to provide safe and adequate service, equipment, and facilities for the transportation of property in interstate or foreign commerce; to establish, observe, and enforce just and reasonable rates, charges, and classifications, and just and reasonable regulations and practices relating thereto and to the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, and all other matters relating to or connected with the transportation of property in interstate or foreign commerce."

APPENDIX "B".

Excerpts from Illinois Uniform Act Regulating Traffic on the Highways: Smith-Hurd Ill. Ann. Stats. Chapter 95½; Ill. Rev. Stats. 1953, Chapter 95½.

Chap. 95½, Sec. 228. Wheel and Axle Loads and Gross Weights. — (a) No vehicle or combination of vehicles equipped with pneumatic tires shall be operated, unladen or with load, upon the highways of this State when the gross weight on the road surface through any axle thereof exceeds 16,000 pounds; provided that upon any street or highway included in the system of State highways and constructed of concrete, brick on a concrete base or asphalt on a concrete base, which the Department designates as adequate to carry such a maximum gross weight without undue deterioration or which the Department designates as obsolescent and requiring reconstruction, or upon any street in any city, village or incorporated town, the gross weight on the road surface through any axle may exceed 16,000 pounds but shall not exceed 18,000 pounds, per axle. No vehicle or combination of vehicles equipped with other than pneumatic tires shall be operated, unladen or with load, upon the highways in this State when the gross weight on the road surface through any wheel thereof exceeds 800 pounds per inch width of tire tread or when the gross weight on the road surface through any axle thereof exceeds 16,000 pounds. An axle load shall be defined as the total load transmitted to the road by all wheels whose centers may be included between two parallel transverse vertical planes 40 inches apart extending across the full width of the vehicle.

Any two consecutive axles whose centers are more than

40 inches and not more than 72 inches apart, measured to the nearest inch, shall be defined as tandem axles, and the gross weight transmitted to the road surface through axles so spaced shall not exceed 16,000 pounds per axle.

(b) The gross weight of vehicles and combinations of vehicles, including the weight of the vehicle or combination and its maximum load shall be subject to the foregoing limitations and further shall not exceed the following:

Two-axle motor vehicle	36,000 pounds
Three or more axle motor vehicle	41,000 pounds
Three-axle truck tractor semi-trailer combination	45,000 pounds
Four or more axle truck tractor semi-trailer combination	59,000 pounds
Four-axle truck and trailer combination	63,000 pounds
Five or more axle truck and trailer combination	72,000 pounds
Five or more axle truck tractor semi-trailer combination when transporting loads that cannot reasonably be dismantled or disassembled	72,000 pounds
Five or more axle truck tractor semi-trailer and four wheel trailer combination	72,000 pounds
Trailers	36,000 pounds
Vehicles operating on caterpillar type tracks	40,000 pounds

(c) Cities having a population of more than 50,000 may permit by ordinance axle loads on two-axle motor vehicles 23½ percent above those provided for herein, but such increase shall not become effective until the city has officially notified the Department of the passage of such ordinance and shall not apply to such vehicles when outside of the limits of such city, nor shall the gross weight of any two-axle motor vehicle operating over any street of such city exceed forty thousand (40,000) pounds.

Amended by Act approved July 15, 1953.

Chap. 95½, Sec. 229. Officers to Weigh Vehicles and Require Removal of Excess Loads.—(a) Any police officer having reason to believe that the weight of a vehicle and load is unlawful shall require the driver to stop and submit to a weighing of the same either by means of a portable or stationary scales. If such scales are not available at the place where such vehicle is stopped, the police officer shall require that such vehicle be driven to the nearest public scales.

(b) Whenever an officer upon weighing a vehicle and load, as above provided, determines that the weight is unlawful, such officer shall require the driver to stop the vehicle in a suitable place and remain standing until such portion of the load is removed as may be necessary to reduce the gross weight of such vehicle to such limit as permitted under this Act and shall forthwith arrest the driver. All material so unloaded shall be cared for by the owner or operator of such vehicle at the risk of such owner or operator.

(c) Any driver of a vehicle who fails or refuses to stop and submit the vehicle and load to a weighing, or who fails or refuses when directed by an officer upon weighing of the vehicle to stop the vehicle and otherwise comply with the provisions of this section shall be guilty of a misdemeanor. (Amended by Act approved August 10, 1949.)

229a. Whenever any vehicle is operated in violation of the provisions of Section 131 of this Act, the owner or driver, or both, of such vehicle shall be deemed guilty of such violation and either or both the owner and the driver of such vehicle may be prosecuted for such violation. Except as provided in the second paragrapn of this Section, any person, firm or corporation convicted of such violation shall be fined in an amount equal to two cents per pound for each pound of excess weight when the excess is 2000 pounds or less; four cents per pound for each pound

of excess weight when the excess exceeds 2000 pounds and is 3000 pounds or less, six cents per pound for each pound of excess weight when the excess exceeds 3000 pounds and is 4000 pounds or less; eight cents per pound for each pound of excess weight when the excess exceeds 4000 pounds and is 5000 pounds or less and ten cents per pound for each pound of excess weight when the excess exceeds 5000 pounds.

If the violation complained of is based upon an overload of not more than 350 pounds on a single axle and the defendant proves that such violation resulted from an unavoidable shifting of the load carried in the vehicle, the amount of the fine shall not exceed $1.00. Amended by Act approved Aug. 6, 1951.

229b. (a) (1) The words "commercial vehicle", as used in this section, shall mean a motor vehicle of the second division as defined in Section 2 of "An Act in relation to motor vehicles and to repeal a certain Act therein named", approved June 30, 1919, as amended.

(2) The words "commercial vehicle operator", as used in this section, shall mean a person, firm or corporation which, as owner or lessee, operates, whether individually or through agents, servants or employees, one or more commercial vehicles, as defined herein, upon the public highways of this state, but shall not mean a person, firm, or corporation which is solely a lessor of one or more commercial vehicles.

(3) The words "commercial vehicle operator's privilege", as used in this section, shall mean the privilege, recognized or conferred by any law of this state, of any person, firm or corporation, whether or not evidenced by any registration, license, permit or certificate and whether or not conditioned upon the payment of any tax, license fee or charge, to operate, either individually or through agents, servants or employees, one or more commercial ve-

hicles, as defined herein, upon the public highways of this state.

(b) The commercial vehicle operator's privilege of any commercial vehicle operator shall be suspended as hereinafter provided, when such commercial vehicle operator shall habitually operate one or more commercial vehicles in violation of Section 131 of this Act.

(c) It shall be the duty of each state highway policeman arresting any person for having operated a vehicle in violation of the provisions of Section 131 of this Act to ascertain the make, motor number, serial number and registration and any other identification number of the vehicle having been operated in violation of said section and if the person so arrested was operating as the agent, servant or employee of any person, firm or corporation, the name and address of such person, firm or corporation. Upon the conviction of any person for having operated a vehicle in violation of the provisions of Section 131 of this Act, such policeman shall report, in writing, to the Director of the Department of Public Safety (1) the date of the offense, (2) the name and residence of the driver, (3) the county in which the offense was committed, (4) the court and date of the conviction, (5) the amount of the fine imposed, (6) the make, motor number, serial number and registration and any other identification number of the vehicle so operated in violation of law and (7) if the person so convicted was the agent, servant or employee of another person, firm or corporation, the name and address of such other person, firm or corporation. The Director of the Department of Public Safety shall transcribe the same in the records of his office and shall send a copy of such written report by United States Mail to the person, firm or corporation in whose name the vehicle mentioned in such report is registered within five days after said name becomes known to the Director. The record of any such report so transcribed may be proved by a copy thereof

certified under the hand of said Director. Any such certified copy shall be prima facie evidence of the facts therein set forth, transcribed from the report of the state highway policeman, as above provided.

(d) Whenever it shall come to the attention of the Director of the Department of Public Safety that a total of ten convictions for violation of Section 131 of this Act have been entered during any twelve consecutive months period with respect to the operation of commercial vehicles operated by any one commercial vehicle operator, whether operated individually or through agents, servants or employees of such commercial vehicle operator, it shall be the duty of the Director of the Department of Public Safety to notify the Attorney General of such fact and it shall be the duty of the Attorney General to bring a proceeding in the name of the people of the State of Illinois to suspend the commercial vehicle operator's privilege of such commercial vehicle operator.

(e) Jurisdiction of such proceedings shall be in the Circuit Courts of the respective counties and the Superior Court of Cook County. The venue shall be in any county where any of the offenses referred to in Subsection (c) of this section may have occurred or as provided in an Act of the General Assembly entitled, "An Act in Relation to Practice and Procedure In The Courts of This State," approved June 23, 1933, as amended.

(f) The use and operation by any person of a vehicle over the highways of this state shall be deemed an appointment by such person of the Secretary of State, to be his true and lawful attorney upon whom may be served all legal process in any proceeding brought against him under this Act and said use or operation by him shall be signification of his agreement that any such process against him which is so served shall be of the same legal force and validity as though served upon him personally if such

person is a non-resident of this state or at the time a cause of action arises under this Act is a resident of this state but subsequently becomes a non-resident of this state. Service of such process shall be made by serving a copy upon the Secretary of State or by filing a copy in his office and such service shall be sufficient service upon such person; if notice of such service and a copy of the process are, within 10 days thereafter, sent by registered mail by the Attorney General to the defendant, at the last known address of the defendant, and the affidavit of compliance herewith of the Attorney General or an Assistant Attorney General is appended to said summons. The court in which the action is pending may order such continuances as may be necessary to afford the defendant reasonable opportunity to defend the action. The Secretary of State shall keep a record of all such processes, which shall show the day and hour of such services.

When a final order is entered against any defendant who shall not have received notice of service and a copy of the process by registered mail, required to be sent to him as herein provided, and he shall within 6 months after the entry of said decree appear in open court and file a verified petition showing that he did not receive such notice of service and copy of the process and showing facts that he has a good and substantial defense to such action, he may appear and answer the allegations of the complaint, and thereupon such proceedings may be had as if the defendant had appeared in due season and no order had been entered. If it appears upon the hearing that such order ought not to have been entered, the same may be set aside, altered or amended as shall appear just, otherwise, it shall be ordered to stand confirmed against such defendant.

(g) The provisions of an Act of the General Assembly entitled, "An Act In Relation to Practice and Procedure In The Courts of This State," approved June 23, 1933, and all existing and future amendments of said Act and

modifications thereof, and the rules now or hereafter adopted pursuant to said Act, shall apply to all proceedings hereunder, except as herein otherwise provided or except when inconsistent with the provisions of this Act.

Proof that a total of ten or more convictions for violation of Section 131 of this Act have been entered during any twelve months period with respect to the operation of one or more commercial vehicles by any one commercial vehicle operator, whether operated individually or through agents, servants or employees of such commercial vehicle operator, shall constitute prima facie evidence that such commercial vehicle operator has habitually operated a commercial vehicle or more than one commercial vehicle in violation of Section 131 of this Act. In any proceeding brought under this section, the court shall not find that a defendant has habitually operated one or more commercial vehicles in violation of Section 131 of this Act unless and until the court shall have considered the evidence to the contrary, if any, offered by the defendant, and such evidence may include, but shall not be limited to, evidence relating to the character and gravity of such violations and the extent of the operations of commercial vehicles by or on behalf of such defendant upon the public highways of this state which did not involve any such violations.

(h) The papers, entries and records of the Secretary of State of this state, and of the officer of any other state in whose office any such commercial vehicle may be registered, showing the ownership of any such commercial vehicle, may be proved by a copy thereof, certified under the hand of the Secretary of State of this state, or of said officer of such other state. Any such certified copy, when admitted in evidence, showing ownership of a commercial vehicle in a person of the same name as the defendant shall be prima facie evidence that the defendant is or was the owner of such commercial vehicle.

(i) Whenever the court shall find from the evidence that a commercial vehicle operator has habitually operated a commercial vehicle or more than one commercial vehicle in violation of Section 131 of this Act, it shall enter an order suspending the commercial vehicle operator's privilege of such commercial vehicle operator for a period of 90 days. If at any time thereafter in another proceeding brought under this section, the court shall find from the evidence that a commercial vehicle operator has again habitually operated in violation of Section 131 of this Act, it shall enter a similar order of suspension except that the court shall suspend the commercial vehicle operator's privilege of such commercial vehicle operator for a period of one year.

(j) Whenever the court shall enter any order under the provisions of Paragraph (i) of this section, it shall have full and continuing jurisdiction after the entry of such order to enforce any of the provisions thereof by contempt proceedings.

(k) The State's Attorney of any county where any proceedings under this section are brought shall, at the request of the Attorney General, appear and assist the Attorney General; and the State's Attorney, if requested by the Attorney General, shall take over and carry on any such proceedings commenced by the Attorney General.

(l) Whenever any commercial vehicle is operated upon the public highways of this state by or on behalf of any person, firm or corporation at a time when the commercial vehicle operator's privilege of such person, firm or corporation is suspended as provided in this Act, the driver of such vehicle shall be deemed guilty of a misdemeanor, the person, firm or corporation on whose behalf such commercial vehicle is operated shall be deemed guilty of a misdemeanor, and all agents, servants, employees or corporate officers of the person, firm or corporation on whose

behalf such commercial vehicle is operated who shall have knowingly caused or permitted such commercial vehicle to be operated shall be deemed guilty of a misdemeanor, and any one or more or all of such persons, firms and corporations may be prosecuted for such violation. Any individual person convicted of such violation shall be punished by imprisonment for not less than 10 days nor more than 90 days and in the discretion of the court, a fine of not more than $500.00. Any corporation convicted of such violation shall be punished by a fine of not less than $1000.00 nor more than $5000.00.

(m) The Director of the Department of Public Safety, within 10 days after the entry of any order suspending the commercial vehicle operator's privilege of any person, firm or corporation as provided in Subsection (i) of this section, shall send a written notice of the entry of such order to the sheriff of each county and chief of police of each municipality in this state. It shall be the duty of every peace officer to arrest the driver of any commercial vehicle which he shall observe being operated in violation of any such order of suspension.

Added by Act approved July 11, 1951.

APPENDIX "C".

Other Legislation Comparable to Illinois Suspension Provisions.

Only Indiana, in addition to Illinois, has enacted legislation embodying provisions authorizing suspension of operating rights for repeated convictions of State weight laws. The Indiana Act, Chapter 47 Burns Indiana Statutes, Section 436(b), enacted in 1951, provides, in brief, that upon 10 gross overload convictions within a one-year period, an operator who conducts his operations pursuant to a certificate or permit issued by the Indiana Public Service Commission is entitled to a hearing before the Commission to show cause why that administrative tribunal should not suspend that certificate or permit for five days. (If the operator is not subject to the jurisdiction of the Commission, he is entitled to a hearing before the Indiana Financial Responsibility Division to show cause why his privilege to use the highway should not be suspended for the same period of time.) The statute also provides for increased periods of suspension for repeated gross overload convictions. Thus, for 20 convictions within a one-year period, a 10-day suspension is authorized; for 30 convictions within a year's period, a 30-day suspension is authorized, and for more than 30 convictions in any one year, a five-day suspension for each 10 convictions in excess of 30 is authorized.

As can be seen, the Indiana statute, though similar to the Illinois law, has several important differences, chief of which is the length of the suspension period. In the Illinois act, 10 overload convictions in a one-year period are sufficient to result in a 90-day suspension, whereas,

under the Indiana law, the suspension period for the same number of convictions, would be only five days. If an operator is convicted of 10 additional violations during the same year, under the Illinois act, his highway privileges could be suspended for one year, whereas under the Indiana law, the suspension period would be only 10 days.

Another important point of dissimilarity between the two statutes is the fact that under the Illinois act, the suspension proceedings are brought before a court of law for determination of whether or not the operator's highway privileges will be suspended. Under the Indiana law, the suspension proceeding is always brought before an administrative agency which specializes in highway and motor vehicle problems, namely, the Indiana Public Service Commission or the Indiana Financial Responsibility Division.

In addition, the Indiana suspension provisions pertain only to convictions for gross overloads, and do not, as does the Illinois statute, include axle overload convictions.

Of the remaining 46 states, Washington (RCW 46.44.045), New York (Book 62 A, McKinney's Consolidated Laws of New York Annotated Sec. 70(2)), Nebraska (3 R.R.S. 1943, 39-723.05), Arkansas (6 Arkansas Statutes 1947 Annotated, Ch. 8, Sec. 75-819), Connecticut (General Statutes of Connecticut, Ch. 110, Sec. 2422), and South Dakota (S.D.C. 44.5929) have enacted statutes which provide for, in addition to fines, the revocation, for varying time periods, of the State vehicle registration certificate on each vehicle which has been repeatedly found overloaded. Such laws are clearly distinguishable and less drastic than the Illinois statute, since in the one case only the particular vehicle is ruled off the highway, whereas the Illinois act contemplates the removal of the entire trucking operation from the highways of the state.

Of the 39 remaining states, Virginia (Code of Virginia

.338.1) and Maine (1953 Laws of Maine, Ch. 309) have ade statutory provision for the suspension or revocation all highway privileges for operators who fail to pay the es assessed them for overload violations.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 44

LATHAM CASTLE, ATTORNEY GENERAL OF THE STATE OF ILLINOIS, ET AL.,

Petitioners,

vs.

HAYES FREIGHT LINES, INC.,

Respondent

BRIEF OF AMERICAN TRUCKING ASSOCIATIONS, INC., AMICUS CURIAE

FRITZ R. KAHN,
PETER T. BEARDSLEY,
Attorneys for American Trucking Associations, Inc., *Amicus Curiae*

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 44

LATHAM CASTLE, ATTORNEY GENERAL OF THE STATE OF ILLINOIS, ET AL.,

Petitioners,

vs.

HAYES FREIGHT LINES, INC.,

Respondent

BRIEF OF AMERICAN TRUCKING ASSOCIATIONS, INC., AMICUS CURIAE

OPINION BELOW

The opinion on reargument of the Supreme Court of Illinois (R. 50-62) is reported at 2 Ill. 2d 58 and 117 N.E. 2nd 106.

JURISDICTION

Judgment of the Supreme Court of Illinois (R. 62) was entered on January 20, 1954. Thereafter, on April 19, 1954, the petition for writ of certiorari was filed, and was granted on June 7, 1954 (R. 64). Jurisdiction of this Court to review the judgment rests upon 28 U.S.C. §§1257(3) and 2101(f).

STATUTES INVOLVED

Involved are the federal Motor Carrier Act, 1935, as amended, also known as Part II of the Interstate Commerce Act (49 Stat. 543 *et seq.*, as amended, 49 U.S.C. § 301 *et seq.*), and Section 132.02 of the Illinois Uniform Act Regulating

Traffic on the Highways (Ill. Rev. Stats. 1953, Ch. 95½, par. 229b, Vol. 2, p. 257), printed in part as Appendix A and Appendix B, respectively, to the brief for the petitioners (Pet. Br. 19-27).

QUESTION PRESENTED

The sole question presented for review by this Court is whether, as a sanction for the violation of the State's statute establishing weight limits for motor vehicles traveling upon its highways, the State of Illinois may bar from the use of its highways for a period of time all the vehicles of an interstate motor carrier authorized to engage in interstate commerce in the State of Illinois pursuant to a certificate of public convenience and necessity under the federal Motor Carrier Act, 1935.

STATEMENT

1. *The operations of respondent*

The respondent, Hayes Freight Lines, Inc., is a common carrier of property, transporting general commodities by motor vehicle in interstate commerce. It conducts its operations pursuant to a certificate of public convenience and necessity issued to it by the Interstate Commerce Commission under Docket No. MC-42329, authorizing operations between points in the States of Illinois, Indiana, Iowa, Missouri, Kentucky, Tennessee, Ohio, Michigan, Pennsylvania and West Virginia. Respondent also is authorized to and does transport property by motor vehicle in intrastate commerce within the State of Illinois as a line-haul carrier pursuant to a certificate of public convenience and necessity issued by the State.

In the conduct of its business as a common carrier of property by motor vehicle, in both interstate and intrastate commerce, respondent serves approximately 1,035 cities,

villages and communities in the State of Illinois and 2,500 more in the other states in which it operates. Among the things that its transports in interstate commerce over the highways of Illinois, respondent carries military munitions and supplies for the United States Government in its furtherance of the national defense effort. Respondent also operates over the highways of Illinois in the transportation of mail, under contract with the United States Post Office Department, over various routes between, among other places, Sparta, Illinois, and St. Louis, Missouri.

The respondent operates 1,929 motor vehicles and maintains 34 terminals representing a total investment of $5,613,570.91. Employing 2,059 persons, 736 in interstate and intrastate operations within Illinois, respondent has an annual payroll of $8,834,667.00. Other recuring obligations of the respondent include annual payments due on mortgages in the amount of $185,517.56, rentals for terminals of $233,799.67, payments for motor vehicle equipment of $1,088,722.10 and expenditures for tires and gasoline of $831,966.96.

2. *The provisions of the statute*

In Case No. 52-13, pending in the Circuit Court of Marion County, Illinois, the respondent is charged with 157 violations of the statute prescribing weight limits for motor vehicles traveling upon Illinois highways—Section 131 of the Uniform Act Regulating Traffic on the Highways (Ill. Rev. Stats. 1953, Ch. 95½, par. 228, Vol. 2, p. 256). For these violations the drivers of the vehicles presumably were arrested pursuant to Section 132 and appropriate fines imposed against the owner and/or driver in accordance with Section 132.01. (Ill. Rev. Stats. 1953, Ch. 95½, pars. 229 and 229a, Vol. 2, pp. 256-257, quoted in Appendix A.) As an additional penalty it is sought to deny the respondent use of the Illinois highways for a period of 90 days pursuant

to Section 132.02 of the Uniform Act challenged herein. Section 132.02 provides, in part:

> (b) The commercial vehicle operator's privilege of any commercial vehicle operator shall be suspended as hereinafter provided, when such commercial vehicle operator shall habitually operate one or more commercial vehicles in violation of Section 131 of this Act.
>
> * * * * *
>
> (g) . . . Proof that a total of ten or more convictions for violation of Section 131 of this Act have been entered during any twelve months period with respect to the operation of one or more commercial vehicles by any one commercial vehicle operator, whether operated individually or through agents, servants or employees of such commercial vehicle operator, shall constitute prima facie evidence that such commercial vehicle operator has habitually operated a commercial vehicle or more than one commercial vehicle in violation of Section 131 of this Act . . .
>
> * * * * *
>
> (i) Whenever the court shall find from the evidence that a commercial vehicle operator has habitually operated a commercial vehicle or more than one commercial vehicle in violation of Section 131 of this Act, it shall enter an order suspending the commercial vehicle operator's privilege of such commercial vehicle operator for a period of 90 days. If at any time thereafter in another proceeding brought under this section, the court shall find from the evidence that a commercial vehicle operator has again habitually operated in violation in Section 131 of this Act, it shall enter a similar order of suspension except that the court shall suspend the commercial vehicle operator's privilege of such commercial vehicle operator for a period of one year.

During the period of time within which the respondent committed the 157 violations for which its right to traverse the highways of Illinois is sought to be suspended, respondent operated approximately 60,000 vehicle-trips over the

highways of Illinois, traveling approximately 90,000,000 miles, and transporting approximately 7,500,000 pounds of property daily. The offenses themselves resulted from "axle" overloads, due to the shift of cargo during the course of operation of the vehicles; only two violations involved "gross" overloads, in which the weight of the vehicle and load exceeded the maximum allowance of 59,000 pounds gross established by statute for the type of vehicle operated.

In this connection, it is noted that petitioners suggest (Pet. Br. 17) that this Court "take judicial notice that overloaded trucks will destroy the highways of Illinois." Certainly, it is conceded that all motor carriers must make every effort to conform with the size and weight limits prescribed by the various states, regardless of their reasonableness in any given instance. However, to suggest, as do petitioners, that the slightest overload, gross or axle, "destroys the highways" begs the question by assuming that state load limits are invariably set at the maximum weight possible without danger of damage to the states' highway system. The history of Illinois load limits refutes this assumption. Prior to July 17, 1945, the Illinois gross load limit for tractor semi-trailer combinations, irrespective of the number of axles, was 40,000 pounds, and the axle load limit was 16,000 pounds. Effective July 17, 1945, the law was amended to authorize gross loads of 45,000 pounds for three-axle tractor semi-trailer combinations and 59,000 pounds for such combinations having four or more axles, and increase the axle load limit to 18,000 pounds. As a matter of fact, Illinois today allows gross load limits as high as 72,000 pounds on certain vehicle combinations. Thus, it will be seen that on July 16, 1945, any tractor semi-trailer with a gross weight in excess of 40,000 pounds or axle load exceeding 16,000 pounds was in violation of the law in Illinois, whereas on the succeeding day four-axle tractor semi-trailers could be legally loaded to gross weights of

59,000 pounds, and axle loads of 18,000 pounds also were legal. Do petitioners contend that in the period between the lower and higher limits, Illinois so modified its entire highway system as to enable it to carry the greater loads without the destruction which their argument assumes would otherwise have occured? If further refutation of the argument were needed, it could be pointed out that all states allow the movement, under special permits, of motor vehicles loaded greatly in excess of applicable weight limits. It is respectfully suggested that there is absolutely no basis for this Court to assume that trucks loaded in excess of the presently-applicable load limits of Illinois *ipso facto* destroy the highways of that State.

3. *The decision of the Illinois Supreme Court*

Charged with the habitual violation of the size and weight laws and threatened by the suspension of its operating rights, respondent brought an action against petitioners in the Circuit Court of Marion County, Illinois, seeking declaratory judgment that Section 132.02 of the Uniform Act was unconstitutional and an injunction restraining petitioners from proceeding with the suspension action. The Circuit Court dismissed the complaint (R. 13), and respondent appealed to the Supreme Court of Illinois. The Supreme Court sustained the respondent's contention that the challenged suspension section when applied to carriers operating pursuant to certificates of convenience and necessity issued by the Interstate Commerce Commission was in conflict with the federal Motor Carrier Act and to that extent invalid (R. 58-62). Accordingly, the Supreme Court of Illinois reversed the decree of the Circuit Court with instructions to enter a decree in accordance with the views expressed in the opinion of the Court (R. 63). Petitioners sought certiorari for a review of the decision of the Supreme Court of Illinois.

4. *The interest of American Trucking Associations*

The issue before this Court is of great interest to American Trucking Associations, Inc. A.T.A. is the national organization of the trucking industry, representing all types of motor carriers of property. Organized and existing as a non-profit corporation under the laws of the District of Columbia, A.T.A. maintains offices at 1424 Sixteenth Street, Northwest, Washington, D. C. Its brief, *amicus curiae*, is submitted with the consent of both parties, pursuant to the provisions of Rule 42(2).

The ability of the trucking industry effectively and efficiently to serve the commerce of America is dependent upon the continued untrammeled movement of motor vehicles through the various states. To be sure a state may properly detain a particular truck that exceeds the prescribed weight limits. However, to the extent that each of the states may bar all operations of motor carriers because of a small number of violations of local laws and ordinances the free movement of trucks across the length and breadth of this nation will have been impeded. Fettered in this fashion, the trucking industry will be unable to fulfill its intended function of providing speedy, economical and flexible transportation to government, industry and agriculture, and not only the trucking industry but the economy of the country in general will suffer irreparable injury.

5. *The consequences of an adverse decision*

A decision that a state may bar a certificated interstate motor carrier from the use of its highways for the violation of its size and weight laws would have far-reaching and devastating consequences. In the instant situation, of course, the petitioners could be expected to proceed with their action seeking a 90-day suspension of the respondent's use of the Illinois highways. If imposed, the suspension

could very well result in the financial ruin and bankruptcy of the respondent as approximately 62½ percent of its operations in interstate commerce originate or terminate in, or require the crossing of, the State of Illinois. The fate of the respondent, however, would be relatively insignificant in the totality of the effects of an adverse determination of the issue herein.

If the State of Illinois succeeds in denying the use of its highways to all vehicles operated by interstate motor carriers, a small number of whose vehicles have violated the state's weight laws, it can be anticipated that other states as well will seek to avail themselves of this easy substitute for more painstaking law enforcement. Undoubtedly these states, as Illinois, will rely on the spurious argument that the suspension of carriers' operating rights is necessary for the enforcement of these laws, that fines are no deterrent to overloading of motor vehicles as they are merely one more cost of doing business passed on to the shipper (Pet. Br. 15). The argument disregards completely the intense competition encountered in the trucking industry, not only from other motor carriers but also from the railroads and water carriers, that serves to prevent the adjusting of a carrier's rates to accommodate overload fines. The argument furthermore ignores the availability of other remedies effectively used, such as the banning of the vehicles actually overloaded, the impounding of overloaded vehicles or even the arrest of the operators. (See Appendix A.)

If the remedy of the suspension of interstate operating rights may be invoked in the enforcement of a state's law prescribing weight limits for vehicles traveling upon its highways, the sanction may be imposed for the violation of nearly all motor vehicle laws. Conceivably, a suspension of operating rights could be imposed for the violation of a traffic ordinance as well; an interstate motor vehicle operator instead of receiving a fine for overtime parking could

be given a suspension. And if suspensions of 30 days or a year are valid, would not suspensions of five years or ten years be lawful, too?

With the several states imposing suspension of operating rights upon interstate motor carriers for violations of their motor-vehicle and traffic laws and those suspensions being of virtually unlimited duration, the federal scheme for the regulation of interstate truckers manifested in the Interstate Commerce Act would be rendered nugatory. Carriers having received certificates from the Interstate Commerce Commission upon a showing of a need for the service and their ability and willingness to render the service in accordance with the Act would be prevented from performing their obligations. The transportation to have been performed by them would have to be undertaken by others—either competing carriers which would have to expand their facilities to accommodate the additional traffic or holders of temporary operating authority granted for that purpose by the Commission. The financial position of the carriers suffering suspensions would be impaired, and the consequent measures taken to secure additional revenue would disrupt the established rate patterns approved by the Commission. Except for the most compelling reasons, these results that would surely follow a determination that a state may suspend interstate operating rights for violations of state law should not be allowed.

SUMMARY OF ARGUMENT

Absent the exercise of federal authority, a state may enact under its reserved powers reasonable measures having indirect and incidental effect on interstate commerce. To promote the welfare of its citizenry a state has the power to control and regulate the public highways and their use. For the breach of its regulations the state may impose sanctions, provided, however, that the sanctions themselves do

not exceed the state's authority. The privilege of a carrier in interstate commerce to do business within a state is beyond the power of the state to revoke or suspend as a sanction for the breach of its regulations. The statute of the State of Illinois providing for the suspension of the use of the State's highways as a sanction for the violation of the weight law is unconstitutional as applied to an interstate motor carrier certificated under the Motor Carrier Act. The Illinois law unreasonably impedes the Interstate Commerce Commission's administration of the Interstate Commerce Act.

ARGUMENT

Absent the exercise of federal authority, a state may enact under its reserved powers reasonable measures having indirect and incidental effect on interstate commerce.

It has been well established since this Court's decision in *Cooley* v. *Board of Wardens of the Port of Philadelphia, et al.*, 12 How. 299, 13 L. Ed. 996, that unless the subject matter is of such a nature as to require the exclusive legislation of Congress and until the Congress should find it necessary to exert its power, a state may legislate with respect to local matters indirectly and incidentally affecting interstate commerce. *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Serv. Comm.*, 341 U.S. 329, 71 S. Ct. 777; *Toomer* v. *Witsell*, 334 U. S. 385, 68 S. Ct. 1156; *Parker* v. *Brown*, 317 U. S. 341, 63 S. Ct. 307; *California* v. *Thompson*, 313 U. S. 109, 61 S. Ct. 930. A state is thus enabled to deal with local exigencies and to exert in the absence of conflict with federal legislation an essential protective power. *Breard* v. *City of Alexandria, La.*, 341 U. S. 622, 71 S. Ct. 920; *Kelly* v. *Washington*, 302 U. S. 1, 58 S. Ct. 87. The only requirements consistently recognized have been that the regulation

not discriminate against or place a burden on interstate commerce, that it safeguard an obvious state interest, and that the local interest at stake outweigh whatever national interest there might be in the prevention of state restrictions. *Cities Service Gas Co.* v. *Peerless Oil and Gas Co.*, 340 U. S. 179, 71 S. Ct. 215.

To promote the welfare of its citizenry a state has the power to control and regulate the public highways and their use.

A state has broad powers of regulation respecting the use of its highways. It may require the operator of a motor vehicle engaged in interstate commerce to secure a driver's license. *Buck* v. *People of State of California*, 343 U. S. 99, 72 S. Ct. 502; *U. S. Fidelity & Guaranty Co.* v. *Guenther*, 281 U. S. 34, 50 S. Ct. 165. It may require an interstate motor carrier to register the operation of its vehicles. *Lloyd A. Fry Roofing Co.* v. *Wood*, 344 U. S. 157, 73 S. Ct. 204; *Clark* v. *Poor*, 274 U. S. 554, 47 S. Ct. 702. To assist it to defray the costs of constructing and maintaining its highways a state may exact payment of permit, registration and license fees and gasoline and similar taxes. *Aero Mayflower Transit Co.* v. *Board of Railroad Com'rs.*, 332 U. S. 495, 68 S. Ct. 167; *Aero Transit Co.* v. *Georgia Commission*, 295 U. S. 285, 55 S. Ct. 709; *Hendrick* v. *Maryland*, 235 U. S. 610, 35 S. Ct. 140.

The state in the exercise of its police power may regulate the design and structure of the motor vehicle, *Maurer* v. *Hamilton*, 309 U. S. 598, 60 S. Ct. 726, and it may say what manner of advertising may be placarded on the sides of the vehicles. *Railway Express Agency* v. *People of State of New York*, 336 U. S. 106, 69 S. Ct. 463. In the absence of federal regulations it seems clear that a state may prescribe size and weight limits for motor vehicles traveling upon its highways in interstate commerce. *South Carolina*

State Highway Dept. v. *Barnwell Bros.*, 303 U. S. 177, 58 S. Ct. 510; *Sproles* v. *Binford*, 286 U. S. 374, 52 S. Ct. 581; *Morris* v. *Duby*, 274 U. S. 135, 47 S. Ct. 548. Accordingly, no challenge is presented herein to the validity of Section 131 of the Uniform Act prescribing the maximum allowable weights for trucks using the Illinois highways. It is simply the additional penalty sought to be imposed for the violation of Section 131 that is challenged as being unlawful and unconstitutional.

For the breach of its regulations the state may impose sanctions, provided, however, that the sanctions themselves do not exceed the state's authority.

A state has the power to impose varied sanctions for the breach of its duly-promulgated regulations. Among these is the power to arrest and presumably fine and/or imprison an operator violating the law. *Lloyd A. Fry Roofing Co.* v. *Wood*, *supra*. The vehicle itself that fails to comply with the state's regulations may be barred from the state's highways, *South Carolina State Highway Dept.* v. *Barnwell Bros.*, *supra*., or, having succeded in obtaining entry, the vehicle conceivably may be impounded by the authorities. *Dixie Ohio Express Co.* v. *State Revenue Commission*, 306 U. S. 72, 59 S. Ct. 435.

The privilege of a carrier in interstate commerce to do business within a state is beyond the power of the state to revoke or suspend as a sanction for the breach of its regulations.

It is virtually axiomatic that any attempt by a state to prescribe who may or may not engage in interstate commerce within its bounds must succumb to the commerce clause. As this Court said in *Buck* v. *Kuykendall*, 267 U. S. 307, 315, 45 S. Ct. 324, 326, in speaking of the act of the State of Washington requiring interstate as well as intra-

state common carriers to obtain certificates of public convenience and necessity:

> Its primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons while permitting it to others for the same purpose and in the same manner. Moreover, it determines whether the prohibition shall be applied by resort, through state officials, to a test which is peculiarly within the province of the federal action—the existence of adequate facilities for conducting interstate commerce . . . Thus, the provision of the Washington statute is a regulation, not of the use of its own highways, but of interstate commerce. Its effect upon such commerce is not merely to burden, but to obstruct it. Such state action is forbidden by the Commerce Clause.

Since the enactment of the Motor Carrier Act of 1935 any attempt by a state to determine what motor carriers may engage in interstate commerce within the state would conflict with the Congressional action and would have to give way under the supremacy clause of the Constitution. Congress gave the Commission authority to regulate interstate common carriers by motor vehicle. 49 Stat. 546, as amended, 49 U. S. C. § 304(a)(1). Congress made it mandatory for them to obtain a certificate to do business. Id., § 306. It gave the Commission broad powers of investigation over these carriers, id., § 304(c), provided for injunction against violations, id., § 322(b), and imposed criminal sanctions. Id., § 322(a). There is virtually no phase of operation that Congress has left untouched. Congress in other words has preempted the field, precluding both inconsistent and overlapping state regulations.

As it is beyond the power of the state to determine which carrier shall engage in interstate commerce within its

boundaries, such attempt at regulation being in conflict with the commerce and supremacy clauses of the Constitution, so also is a state precluded from suspending or revoking the right of a carrier to engage in interstate commerce within the state pursuant to an expressed or implied federal grant of authority. The impotence of the state persists even though the suspension or revocation are to be applied as sanctions for the violation of state laws or regulations lawfully enacted. Thus this Court has consistently held that a state cannot suspend or revoke the right of a carrier deriving its authority from the United States to operate within the state as a remedy to enforce the collection of its taxes. *Interstate Busses Corporation* v. *Blodgett*, 276 U. S. 245, 48 S. Ct. 230; *Pullman Co.* v. *Richardson*, 261 U. S. 330, 43 S. Ct. 366; *St. Louis S. W. R. Co.* v. *Arkansas ex rel. Norwood*, 235 U.S. 350, 35 S. Ct. 99; *Postal Telegraph Cable Co. v. Adams*, 155 U. S. 688, 15 S. Ct. 268; *Western Union Tel. Co.* v. *Commonwealth of Massachusetts*, 125 U. S. 530, 8 S. Ct. 961. As this Court said in *St. Louis S.W.R. Co.* v. *Arkansas ex rel. Norwood, supra* at 368, 105:

> If this must needs to be construed to mean that for non-payment of the franchise tax a foreign railroad corporation engaged in business as a common carrier of intra-state and inter-state commerce is to forfeit its right to do business in the State, not only with respect to intra-state but also with respect to interstate commerce, the effect would be to impose a condition upon its right to transact interstate commerce, and the act would be invalid as amounting in effect to a regulation of that commerce . . .

Similarly it has been held that the operations of an interstate carrier could not be disrupted in the attempt to compel compliance with a municipal regulation allowing the designation of the route through the city of the carrier's lines. *Western Union Tel. Co.* v. *Mayor of the City of New York*, 38 F. 552.

In *Hill* v. *State of Florida*, 325 U. S. 538, 65 S. Ct. 1373, a state statute had been so construed and applied that a union was prohibited from functioning as collective bargaining agent, or in any other capacity, except upon conditions fixed by the state which were not included in the National Labor Relations Act. Among these was a requirement that certain information be filed and that an annual fee of $1.00 be paid. The provision that information be supplied and an annual fee be paid was held not to conflict with the Federal Act but, for failure to comply, the union had been enjoined by a state court from functioning. This Court said at 543, 1375, "It is the sanction here imposed, and not the duty to report, which brings about a situation inconsistent with the federally protected process of collective bargaining."

In each of the foregoing cases the basic laws that were sought to be enforced were valid; the sanctions that were to be applied for their breach, however, were violative of the Constitution. "The sanction there imposed by state statute was repugnant to a right created by a federal statute, and for that reason could not stand. It was not held, nor even intimated, that the sanction would have been in itself unconstitutional had it not impinged upon a federal law." *National Maritime Union of America* v. *Herzog*, 78 F. Supp. 146, 157.

To put the question posed by this proceeding in another light, suppose that the suspension provisions of the statute were directed against interstate railroads, for example, as a penalty for violation of laws governing speed or prohibiting the blocking of rail-highway crossings beyond the time provided by state or local law. Anticipating the argument that the railroads own their rights of way, suppose further that the penalty imposed were limited to prohibiting the violating railroad from using city streets or crossing state-owned highways for given periods of time. This Court

has recently said that "railroad tracks are in the streets not as a matter of right but by permission from the State or its sub-divisions." *Atchison, T. & S. F. Ry. Co.* v. *P. U. C.*, 346 U. S. 346, 353 (prelim.), 74 S. Ct. 92, 96. Nevertheless, it seems certain that a state law which declared that a railroad's use of all city streets in the state or its privilege of crossing state highways with its trains might be suspended for 90 days or a year upon proof of violation of admittedly valid state or local laws would be universally condemned as an unreasonable intereference with interstate commerce. Although much is said in the briefs of petitioners and the American Automobile Association, Inc., *amicus curiae*, regarding state power to deal with interstate commerce in the absence of federal regulation, neither brief cites *Southern Pac. Co.* v. *State of Arizona*, 325 U. S. 761, 65 S. Ct. 1515, wherein an Arizona train-length limit law was held unconstitutional even in the absence of federal regulation. There this Court said at 783, 1527:

> Here examination of all the relevant factors makes it plain that the state interest is outweighed by the interest of the nation in an adequate, economical and efficient railway transportation service, which must prevail.

So, here, in this proceeding it is submitted that the interest of the State of Illinois in enforcing its weight-limit laws must yield to the interest of the nation in the adequate, economical and efficient transportation service required by the National Transportation Policy enacted by the Congress, 54 Stat. 899, 49 U. S. C., preceding § 1. This does not mean that Illinois is without adequate power to deal with violations of its weight-limit laws. To suggest, as do petitioners (Pet. Br. 15), that "the imposition of fines is no deterrent to overloading of motor vehicles" but merely results in "one more cost of doing business passed on to the shipper" is to reveal an appalling ignorance of the facts of present-day competitive transportation life. The plain truth is that

transportation, except for periods marked by extreme shortages of equipment such as during World War II, is in a buyer's market, and the most intense competition exists within the trucking industry and between trucks and the rails, for all manner of traffic susceptible of handling by both modes of transport. The motor carrier which sought to pass on increased costs incurred by reason of overloading fines through a rate increase of even one cent per hundred pounds in excess of his competitors' charges would simply put himself out of business.

The statute of the State of Illinois providing for the suspension of the use of the State's highways as a sanction for the violation of the weight law is unconstitutional as applied to an interstate motor carrier certificated under the Motor Carrier Act.

The suspension by a State of the authority of an interstate motor carrier to operate pursuant to its certificate of public convenience and necessity issued under the Motor Carrier Act would conflict with the commerce and supremacy clauses of the Constitution and would deprive the respondent of property without due process of law.

In *Simpson* v. *Shepard* (The Minnesota Rate Cases), 230 U. S. 352, 399, 33 S. Ct. 729, 740, this Court said:

> The grant in the Constitution of its own force, that is without action by Congress, established the essential immunity of interstate commercial intercourse from the direct control of the States with respect to those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all, their regulation should be prescribed by a single authority. It has repeatedly been declared by this Court that as to those subjects which require a general system or uniformity of regulation, the power of Congress is exclusive. In other matters, admitting of diversity of treatment according to special requirements of local condi-

tions, the States may act within their respective jurisdictions until Congress sees fit to act; and, when Congress does act, the exercise of its authority overrides all conflicting state legislation.

The principle, which determines this classification, underlies the doctrine that the States cannot under any guise impose direct burdens upon interstate commerce. For this is but to hold that the States are not permitted directly to regulate or restrain that which from its nature should be under the control of one authority and be free from restriction save as it is governed in the manner that the national legislature constitutionally ordains.

Thus, the States cannot tax interstate commerce, either by laying the tax upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts, as such, derived from it; or upon persons or property in transit in interstate commerce.

They have no power to prohibit interstate trade in legitimate articles of commerce; or to discriminate against the products of other States; or to exclude from the limits of the State corporations or others engaged in interstate commerce or to fetter by conditions their rights to carry it on; or to prescribe the rates to be charged for transportation from one State to another, or subject the operations of carriers in the course of such transportation to requirements that are unreasonable or pass beyond the bounds of suitable local protection. [Citations omitted.]

Prior to the enactment of the Motor Carrier Act a state could not require an interstate carrier to secure a certificate of public convenience and necessity as a condition precedent to operating within the state. *Buck* v. *Kuykendall, supra.* Conversely, it is doubtful whether a state could have excluded an interstate carrier from the use of its roads as a sanction for the violation of its laws, for such exclusion would have cast a burden upon interstate commerce. With the enactment of the Motor Carrier Act, and the regulations

thereunder, there ceased to be any doubt that a state could not suspend the operations of an interstate motor carrier. *Eichholz* v. *Public Service Commission*, 306 U. S. 622, 59 S. Ct. 532; *H. P. Welch Co.* v. *State of New Hampshire*, 306 U. S. 79, 59 S. Ct. 438.

Sections 206 and 207 of the Interstate Commerce Act (49 Stat. 551, as amended, 49 U.S.C. §§ 306, 307) prescribe the conditions and procedures for a common carrier by motor vehicle to secure a certificate of public convenience and necessity from the Interstate Commerce Commission. In accordance with their provisions respondent was authorized to engage in interstate commerce as a common carrier by motor vehicle in the State of Illinois, among other states.

Section 212 of the Act (49 Stat. 555, as amended, 49 U.S.C. 312) provides for the suspension, change, revocation and transfer of certificates of public convenience and necessity. It states specifically that, "Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided." The procedure prescribed for suspension is not germane to the issue herein except insofar as the petitioners have made and are making no pretense to comply with the prescribed procedure in their quest to suspend respondent's use of the Illinois highways.

The procedure of Section 212 for the suspension or revocation of operating authority is exclusive. A certificate of public convenience and necessity issued by the Interstate Commerce Commission remains in full force and effect except as modified, suspended or revoked by the Commission in accordance with the provisions of Section 212. *Boulevard Transit Lines* v. *U. S.*, 77 F. Supp. 594. Speaking of the life span of such a certificate once it has been issued, the District Court for the District of Massachusetts in *General Transp. Co.* v. *U. S.*, 65 F. Supp. 981, 985, said:

> That matter is covered by § 212(a) of Part II of the Act, 49 U.S.C.A. § 312(a) which provides that certificates

> from their effective date "shall remain in effect until suspended or terminated as herein provided," and that termination, except upon application of the holder, must be by the Commission, either upon complaint or on its own initiative, after notice and hearing. This explicit provision seems . . . fully to warrant the Commission's interpretation of the Act in Quaker City Bus Co.—Purchase—Blackhawk Line, Inc., 28 M.C.C. 663, in which it said (p. 666): "The mere fact of interruption in operations does not automatically revoke a certificate. To accomplish a revocation of a certificate the provisions of Section 212(a) must be satisfied." "Until that certificate is revoked in accordance with the procedure prescribed in § 212(a), it remains in full force and effect."

If the Illinois statute involved in this proceeding is valid as applied to interstate motor carriers franchised by the Interstate Commerce Commission, it is obvious that other states may devise different statutory schemes for the suspension of such carriers' use of their highways. As a practical matter, then, the reasons for such suspensions, the method by which they would be invoked, and their duration would be limited only by the imagination of the various state legislatures in enacting such suspension statutes. Once the validity of such suspension laws is admitted, it is obvious that state laws providing therefor would run the gamut from relatively minor infractions to more serious ones. Thus the anomalous situation would be brought about in which carriers which met identically the same burden in securing their I.C.C. franchises, i.e., proof of public convenience and necessity in the case of common carriers and consistency with the public interest and the National Transportation Policy in the case of contract carriers, would find that their right to operate could be suspended for a multitude of reasons based on provisions of differing state laws, and even on differing state court interpretations of laws written in identical language, with one operator forced to suspend his use of State A's highways for a relatively trivial offense, while another,

competing carrier could continue to use the highways of State B even though guilty of more serious infractions of its laws.

The extent to which such varying laws and court interpretations would result in acute discrimination between motor carriers operating in interstate commerce under franchises issued by the Interstate Commerce Commission can be readily illustrated. For example, a typical case might involve competing motor carriers operating between Memphis, Tennessee, and Des Moines, Iowa, one of them via Illinois highways, the other those of Missouri. Assuming the validity of the Illinois statute here in issue, the opportunity for discrimination against the carrier using its highways is patent.

The requirement that a certificate of public convenience and necessity issued by the Interstate Commerce Commission be suspended, changed or revoked only in accordance with the provisions of Section 212 is necessary to assure that the certificated carrier not be deprived of property without due process of law. It has been established that "the holder of the certificate must be recognized as the holder of property and that such property may not be taken from it without due process and with an arbitrary or unreasonable motive." *Texas & Pacific Motor Transport Co.* v. *U. S.*, 87 F. Supp. 107, 110, reversed on other grounds 340 U. S. 450, 71 S. Ct. 422. In the words of this Court in *Railroad Commission* v. *Pacific Gas and Electric Co.*, 302 U. S. 388, 393, 58 S. Ct. 334, 338:

> The right to a fair and open hearing is one of the rudiments of fair play assured to every litigant by the Federal Constitution as a minimal requirement. *Ohio Bell Telephone Co.* v. *Public Utilities Comm'n.*, 301 U. S. 292, 304, 305. There must be due notice and an opportunity to be heard, the procedure must be consistent with the essentials of a fair trial, and the Commission must act upon evidence and not arbitrarily.

The right of the respondent to a hearing before the Interstate Commerce Commission preceding the suspension of its operating rights would be denied under Section 132.02 of the Illinois Uniform Act. To that extent the respondent would be deprived of property without due process of law.

Furthermore the suspension procedure of Section 132.02 of the Illinois Uniform Act is in addition to and in conflict with the suspension procedure of Section 212 of the Interstate Commerce Act. Under Article II of the Constitution declaring federal enactments to be the supreme law of the land, the state regulation seeking to occupy the same field as the federal must yield to the latter.

However, even in the absence of the Motor Carrier Act, the Illinois statute purporting to deny use of the Illinois highways to a motor carrier engaged in interstate commerce as a sanction for the violation of its size and weight law would be unconstitutional as a burden upon interstate commerce in violation of Article I, Section 8.

The Illinois law unreasonably impedes the Interstate Commerce Commission's administration of the Interstate Commerce Act

Neither the brief of petitioners nor that of the American Automobile Association, Inc., *amicus curiae*, treats the matter of regulation by the Interstate Commerce Commission of carriers such as respondent, and the effect upon the Commission's administration of the Interstate Commerce Act of upholding the constitutionality of the Illinois statute here involved. But it is the Commission, and not the states, which is charged with the duty, under the National Transportation Policy, of assuring "fair and impartial regulation of all modes of transportation" subject to the Act and the promotion of "safe, adequate, economical and efficient service * * * among the several carriers." In order to carry out the mandate of the National Transpor-

tation Policy, the Commission is required, among other duties, to determine whether the public convenience and necessity requires additional motor carrier service between the points and places or within the areas designated by such carriers in their applications filed with the Commission from time to time pursuant to the provisions of the applicable section of the law. 49 Stat. 551, as amended, 49 U.S.C.A. 306. How, then, is the Commission to properly administer the Interstate Commerce Act, if each state has the power, in effect, to suspend the franchise issued by the Commission for varying periods of time? Suppose, for example, that Illinois should ultimately suspend, for one year, an interstate motor carrier's use of its highways. Suppose, too, that the suspended carrier held extensive authority from the Commission to perform service to and from many Illinois points, requiring the use of a substantial number of vehicles. There can be no argument but that there is a public need for the service covered by the suspended franchise; otherwise the Commission would not have authorized it in the first instance.

When Illinois, therefore, suspends the carrier's use of its highways, there is a service void, with respect to which the State of Illinois is apparently unconcerned, but with which the Commission must be concerned in its administration of the Interstate Commerce Act.

The Commission would seem to have but two choices of action open to it in the situation outlined: First, the issuance of permanent operating authority to another carrier, duplicating the authority held by the suspended carrier; second, the issuance of temporary authority, for a period not to exceed one hundred and eighty days, to another carrier. 52 Stat. 1238, as amended, 49 U.S.C. § 310a. In the first case, the Commission's action might be self-defeating in that, after the one year's suspension had expired, there would be two motor carriers authorized permanently to perform service to and from the same Illinois points,

whereas the public had need for only one such carrier, thus contravening the mandate of the Transportation Policy to "foster sound economic conditions in transportation and among the several carriers." The second alternative, particularly in those cases in which the suspended carrier served a large number of Illinois points, would present an even more difficult obstacle. Where the effort to fill the service void resulting from suspension of the right to use Illinois highways would require the purchase or lease of a large number of vehicles by a motor carrier attempting to continue the suspended carrier's service, no such carrier could reasonably be expected to incur the expense incident to such increased operations, knowing that its additional operating authority was only temporary and in any event was conditioned to expire one hundred and eighty days after its institution. It is respectfully suggested that an interpretation which upholds the validity of the Illinois statute here involved would ultimately impose an onerous, perhaps intolerable, burden upon the Commission in its efforts to administer the Interstate Commerce Act in accordance with the mandate of the National Transportation Policy.

CONCLUSION

In view of the foregoing, American Trucking Associations, Inc., *amicus curiae*, prays that this Court will affirm the decision of the Supreme Court of Illinois.

Respectfully submitted,

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Peter T. Beardsley,
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Amicus Curiae

APPENDIX A

Sections 132 and 132.01 of the Uniform Act Regulating Traffic on Highways (Ill. Rev. Stat., 1953, Ch. 95½, pars. 229, 229a, Vol. 2, pp. 256-257).

§ 132. Officers to Weigh Vehicles and Require Removal of Excess Load.—(a) Any police officer having reason to believe that the weight of a vehicle and load is unlawful shall require the driver to stop and submit to a weighing of the same either by means of a portable or stationary scales. If such scales are not available at the place where such vehicle is stopped, the police officer shall require that such vehicle be driven to the nearest public scales.

(b) Whenever an officer upon weighing a vehicle and load, as above provided, determines that the weight is unlawful, such officer shall require the driver to stop the vehicle in a suitable place and remain standing until such portion of the load is removed as may be necessary to reduce the gross weight of such vehicle to such limit as permitted under this Act and shall forthwith arrest the driver. All material so unloaded shall be cared for by the owner or operator of such vehicle at the risk of such owner or operator.

(c) Any driver of a vehicle who fails or refuses to stop and submit the vehicle and load to a weighing or who fails or refuses when directed by an officer upon weighing of the vehicle to stop the vehicle and otherwise comply with the provisions of this section, shall be guilty of a misdemeanor. (As amended by Act approved August 10, 1949.)

§ 132.01. Whenever any vehicle is operated in violation of the provisions of Section 131 of this Act, the owner or driver, or both, of such vehicle shall be deemed guilty of such violation and either or both the owner and the driver of such vehicle may be prosecuted for such violation. Except as provided in the second paragraph of this Section, any person, firm or corporation convicted of such violation

shall be fined in an amount equal to two cents per pound for each pound of excess weight when the excess is 2000 pounds or less; four cents per pound for each pound of excess weight when the excess exceeds 2000 pounds and is 3000 pounds or less; six cents per pound for each pound of excess weight when the excess exceeds 3000 pounds and is 4000 pounds or less; eight cents per pound for each pound of excess weight when the excess exceeds 4000 pounds and is 5000 pounds or less and ten cents per pound for each pound of excess weight when the excess exceeds 5000 pounds.

If the violation complained of is based upon an overload of not more than 350 pounds on a single axle, and the defendant proves that such violations resulted from an unavoidable shifting of the load carried in the vehicle, the amount of the fine shall not exceed $1.00. (As amended by act approved August 6, 1951.).

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

NO. 44

LATHAM CASTLE, ATTORNEY GENERAL OF THE STATE OF ILLINOIS, ET AL.,

Petitioners,

vs.

HAYES FREIGHT LINES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF OF STATE OF INDIANA AS AMICUS CURIAE

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INTEREST OF AMI

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IN THE

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NO. 44

LATHAM CASTLE, ATTORNEY GENERAL OF THE STATE OF ILLINOIS, ET AL.,

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF OF STATE OF INDIANA AS AMICUS CURIAE

FOREWORD

Illinois and Indiana share the common problem of the second most congested traffic area in the United States: the Chicago commercial zone and the Calumet-Lake County District. Every week day in the Calumet district alone motor vehicles make an average of 355,335 trips each 24 hours, for an aggregate total of 2.6 million miles per day. This survey was based on 1949 figures, published in 1953,

with the estimate that this traffic will increase by 114 per cent by the year 1970.*

The experience of this state with the imposition of fines as a penalty for violations of the Indiana gross weight limitations forcefully bears out the statement of the Illinois Supreme Court:

> "* * * that the truckers find the payment of statutory penalties when violation is established to be economically preferable to compliance. * * *." *Hayes Freight Lines, Inc., vs. Latham Castle, Atty. Gen., et al.*, 2 Ill. 2d 58, 117 N. E. 2d 106, 112.

Thus, in May, 1953, the Indiana Legislature established a special detail of 12 state policemen to concentrate exclusively on violations of the Public Service Commission laws. These 12 men, during the years 1953 and 1954, made 75 per cent of the staggering number of arrests for overweight violations, shown below:

1953		*1954*	
May	399	January	611
June	312	February	595
July	139	March	675
August	406	April	595
September	847	May	502
October	894	June	617
November	668	July	465
December	641	August	695
Total	4306	Total	4655

* 1953, Calumet District Traffic Survey Report of the State Highway Dept. of Indiana (Federal Aid Project SWHP-1 14), prepared by the Metropolitan Area Traffic Survey Unit of the State Highway Dept. of Indiana with the cooperation of the Bureau of Public Roads, and the cities of Gary, Hammond, East Chicago, Whiting and Hobart, Indiana.

The State of Indiana has therefore been compelled to resort to more stringent measures for the enforcement of its gross weight limitations. The remedy has been found in two Indiana statutes. The first, Burns' Indiana Statutes, 1952 Replacement, Section 47-536b, enacted in 1951, affords sanctions for repeated weight violations, much like those of the Illinois statute at issue in the case at bar, though less severe than the sanctions imposed by the Illinois statute. (See Resp. Br., Appendix C, for comparison of Indiana and Illinois statutes.)

A second Indiana statute vests in the Public Service Commission of Indiana a general authorization to suspend the state certificates or permits of operating authority of motor carriers, including inter-state carriers "for • • • *willful* failure to comply with any provisions of this act (the Public Service Commission Act) • • • with any term, condition or limitation of such certificate or permit." Burns' Indiana Statutes, 1952 Replacement, Section 47-1233. (Emphasis supplied.)

The validity of the last mentioned statute has twice been in litigation during the year, 1953. In that year the Indiana Public Service Commission gave notice to two inter-state motor carriers, operating through the Calumet district, to show cause why they should not have their state operating certificates suspended by reason of repeated violations of Indiana gross weight limitations. After due hearing, the Commission suspended the certificate of each carrier to use the highways of Indiana for one week. Each carrier appealed to the courts and one case is still pending. The other case was eventually dismissed by the carrier itself.

It is pertinent to note that although the violations of both carriers prior to the time of the court proceedings had

been numerous, in the case of the carrier which dismissed its law suit and instigated a new management policy, no further violations have occurred during the several months since the time of such dismissal.

Indiana, therefore, like Illinois, has a vital interest in the upholding of its statutory right to impose reasonable sanctions for the enforcement of its valid weight regulations. The urgency of this need is highlighted by the aforementioned prospect of a 114 per cent increase in the traffic volume between the years 1949 and 1970.

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ARGUMENT

I.

The Sole Issue In The Case At Bar Is Whether A State Statute, Authorizing Suspension Of The Permit Of An Inter-State Motor Carrier To Use The Highways Of The State, As A Penalty For And A Deterrent To Repeated Violations Of State-Imposed Maximum Weight Limitations, Is Repugnant To Part II Of The Interstate Commerce Act.

Before proceeding with argument it seems advisable to re-state the issue in this case. The sole issue here is whether Congress, in enacting the Federal Motor Carrier Act (now Part II of the Interstate Commerce Act; 49 U. S. C. Sec. 301 et seq.) so completely occupied the field of inter-state motor carrier regulation as to preclude a state from enforcing its weight limitations by suspending the privilege of an offending inter-state trucker to operate over the highways of that state.

Both parties to the case at bar concede that Congressional occupation of the inter-state motor carrier field under Part II of the Interstate Commerce Act is the single question here at issue (Pet. Br. p. 2, Resp. Br. p. 2). Yet repeatedly throughout its brief, Respondent advances arguments which would only have relevance if this appeal were founded upon constitutional questions of "due process", or of state power under the Commerce Clause. Thus Respondent argues that the penalty imposed upon it was unduly severe[1] (Resp. Br. pp. 13, 15), that to interrupt the inter-

[1] Note also Respondent's comparison of the sanctions imposed by the Illinois Statute with those of the similar Indiana Statute (Appendix "C", Resp. Br. pp. 50-51). Respondent seems to suggest that the

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state journey of an offending truck would be a valid means of enforcement, but to interrupt the interstate business of the corporate entity, operating such truck, would not (Resp. Br. p. 23) and that the imposition of heavy fines and prison sentences would be sufficiently effective deterrents to weight violations without resorting to the sanctions here complained of (Resp. Br. 29-30). Granted that the constitutionality of a state statute under the "Due Process" and Commerce Clauses depends upon the reasonableness of the penalty exacted, the suitability of the means of enforcement to the end in view, and the extent of the burden upon interstate commerce. Nevertheless, those questions were determined adversely to Respondent by the court below,[2] Respondent's cross-appeal from the decision of the Illinois court was dismissed by the United States Supreme Court (*Hayes Freight Lines, Inc. v. Castle*, 74 S. Ct. 866) and certiorari was granted on the narrow issue, whether the Illinois Court erred in holding that regulatory powers, admittedly vested in the states prior to enactment of the

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Illinois Statute is unreasonably severe because Illinois has seen fit to exact a 90 day suspension for 10 overload convictions within a year, whereas Indiana exacts only a 5 day suspension for 10 convictions and because Illinois includes axle overload, as well as gross overload, convictions while Indiana counts only the latter.

[2] Finding no violation of due process in the Illinois Statute, the Illinois Supreme Court said:

> "The State's continuing search for effective enforcement techniques to secure compliance with valid weight limits is apparent in the legislation dealing with the subject. (Citations). The General Assembly might infer that the truckers find the payment of statutory penalties when violation is established to be economically preferable to compliance. But the State is entitled to insist upon compliance with its valid regulations, and to shape its penalty to that end." (*Hayes Freight Lines v. Castle*, 2 Ill. 2d 58, 117 N. E. 2d 106, p. 112.)

Federal Motor Carrier Act,[a] were divested and superseded by that enactment in 1935.

If it be true, as the Illinois court held, that the Federal Act precludes a state from suspending the privilege of an interstate motor carrier to use state highways, then a state would be powerless to suspend such privilege, even though the offending carrier flouted state weight limitations daily and deliberately and even though the period of suspension was only for a single day. In order fairly to test the issue presented by this appeal, such an extreme case should be assumed.

II.

A Federally Granted Certificate Of Convenience And Necessity Under Part II Of The Interstate Commerce Act Vests In The Holder No Proprietary Right In The Use Of State Highways, Whether In Interstate Commerce Or Otherwise; Nor Does It Deprive The States Of Their Traditional Police Power To Enforce Valid Size And Weight Regulations, Even By Denying To Offending Motor Carriers The Privilege Of Using State Highways In Interstate Commerce.

It is too well settled to permit of dispute that prior to the Federal Motor Carrier Act, 1935, the states, under their reserved police powers and with a view to the safety and preservation of the public highways, could establish maxi-

[a] The Illinois Supreme Court conceded in the decision below that: "Before the Federal regulation of interstate motor carriers became effective, the power of the States to suspend or revoke authority to engage in interstate commerce, as a sanction of the enforcement of State statutes regulating the use of the highways, was sustained." (*See Hayes Freight Lines v Castle*, 2 Ill. 2d 58, 117 N. E. 2d 106, p. 113).

mum weight limitations for motor vehicles, applicable to intrastate and interstate carriers alike, and could enforce such limitations, even by closing the highways to carriers operating, or threatening to operate, in violation of same, *Morris v. Duby* (1927), 274 U. S. 135; *Sproles v. Binford* (1932), 286 U. S. 374; *Bradley v. Public Utility Commission of Ohio* (1933), 289 U. S. 92; *Wald Storage and Transfer Co. v. Smith*, (D. C. Texas, 1933) 4 F. Supp. 61, affirmed (1933) 290 U. S. 596. This pre-existing power was conceded below by the Illinois Supreme Court, (see footnote 3, this brief), which based its holding on a finding that the state power was superseded by the federal Act, *Hayes Freight Lines v. Castle* (1954), 2 Ill. 2d 58, p. ——, 117 N. E. 2d 106, p. 114.

It is respectfully submitted that the Illinois court erred in so holding. Neither the court below nor Respondent[4] contest the obvious fact that the federal statute leaves open to state regulation the sizes and weights of motor carriers, operating over public highways. To be sure, the Interstate Commerce Commission is "• • • authorized to *investigate* and *report* on the need for Federal regulation of the sizes and weight of motor vehicles • • •" (Pt. II, Interstate Commerce Act, Sec. 226; 49 U. S. C. Sec. 325). (Emphasis supplied.) But this narrow authorization, as pointed out in *Maurer v. Hamilton* (1940), 309 U. S. 598, p. 607,

> "• • • imposes no duty and confers no authority on the Commission to regulate the sizes and weights

[4] Thus Respondent conceded that "Since Congress has not specified, nor authorized the Interstate Commerce Commission to specify, regulations with respect to sizes or weights of motor carriers, this Court has concluded that the state is free, within the bounds of reason, to impose such limitations as it considers proper." (Resp. Br. p. 23).

> of motor vehicles. Its authority is limited to investigation and report of the need of such regulation."

Moreover, when the report was forthcoming, no federal action was recommended to Congress in the weight-size areas, the Coordinator expressing doubts not only "• • • as to what the regulation should be, but also as to how far the federal government has power to interfere with the exercise of the police power of the states with respect to the use of their highways." (See Hearings before Senate Committee on Interstate Commerce on S. 1629, 74th Cong., 1st Sess. (1935) p. 92). Nor did Congress at any time take action in this area.

The Illinois court and Respondent take the position, however, that, while the states may impose weight and size limitations upon interstate, as well as intrastate, traffic, their powers of enforcement, as to interstate traffic, are restricted to measures short of closing the highways to violators of the state regulations. This position is founded on what we submit to be an erroneous assumption that a grant by the Interstate Commerce Commission of a Certificate of Convenience and Necessity confers upon the holder an affirmative right in the use of the public highways in inter-state commerce, which the states are powerless to impair.

The clearest refutation of this affirmative right theory is provided by the federal Act itself, which states, with respect to an Interstate Commerce Commission Certificate:

> "No certificate issued under this part (chapter) shall confer any proprietary or property rights in the use of the Public highways." (See Interstate Commerce Act, Part II, Sec. 207 (b); 49 U. S. C. Sec. 307 (b)).

The manifest import of this language is that the grant of an I.C.C. Certificate does not *create* an affirmative right to use the highways in interstate commerce, but merely *removes* the pre-existing disqualification, which obtained prior to the issuance of such Certificate. Before the enactment of the Motor Carrier Act, 1935, any motor carrier who so desired could operate in inter-state commerce, subject to the right of the states to close their roads to him if he exceeded their weight or size limitations. After the Motor Carrier Act, 1935, only federally certified carriers could operate in interstate commerce, but the Act makes it clear that the federal certificate does not purport to confer upon the privileged few any rights in the use of the highways superior to those enjoyed by all, prior to the passage of the Act.

The United States Court of Appeals for the Fifth Circuit stated the above proposition as follows:

> "Moreover, said act (Motor Carrier Act) does not provide that every person who shall receive a certificate of public convenience and necessity shall be entitled to the use of the various highways of the state, but the said act prohibits any one engaging in interstate commerce until he receives such certificate from the Interstate Commerce Commission." See *Thompson v. McDonald* (CCA 5th, 1938) 95 F2d 937, p. 943.[5]

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[5] *Thompson v. McDonald*, 95 F. 2d 937 specifically held that the federal Motor Carrier Act did not operate to oust the state of Texas of its right to close its highways to an inter-state trucker on the ground that "the highways over which complainant sought to operate are not in such condition as to justify the issuance of a permit to him, and that said highways are now so congested that his operation would unreasonably interfere with the uses thereof by the traveling public" (95 F. 2d p. 941). Nor was the Fifth Circuit Court impressed with complainant's argument that because complainant had an application

In short, the I.C.C. Certificate merely removes a barrier; it creates no proprietary right.

The courts have uniformly upheld the power of the states to deny the use of their highways to motor carriers, violating, or threatening to violate, state weight and size limitations, whether or not operating in inter state commerce—and this *after* the Motor Carrier Act, 1935, as well as theretofore.

In *South Carolina State Highway Department v. Barnwell Bros.* (1938) it was squarely held that the federal Motor Carrier Act, 1935, had not superseded the constitutional right of the state of South Carolina to close its roads to inter-state trucks, weighing, with load, in excess of 20,000 pounds, even though it was shown that 85 to 90 per cent of all inter-state motor trucks weighed in excess of that amount, when loaded, and that only four other states had prescribed such a stringent weight limitation. In *Maurer v. Hamilton* (1940), 309 U. S. 598, the Supreme Court reached the same result with respect to a Pennsylvania statute prohibiting motor trucks which carried vehicles above the cab or over the head of the operators, interstate or otherwise, from operating over highways of that commonwealth. See also *Darnell Trucking Co. v. Simpson* (1940), 122 W. Va. 656, 12 S. E. 2d 516, appeal dismissed (1941), 313 U. S. 549,

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for an interstate certificate pending before the I. C. C., that tribunal had assumed exclusive jurisdiction of the question of complainant's entitlement to use the Texas highways in its interstate business. Although this decision was affirmed by the U. S. Supreme Court, that court was not called upon to decide whether the state power had been superseded by the federal Act, since it found that the trucker had not been operating in compliance with state law in the first place and was not, therefore, entitled to an inter-state certificate. See *McDonald v. Thompson* (1938), 305 U. S. 263.

upholding a West Virginia statute, prohibiting the use of double-decked trucks on highways of that state.

Respondent seeks to distinguish the *Barnwell*, 303 U. S. 177 and the *Maurer*, 309 U. S. 598, cases, supra, on the ground that these decisions merely uphold the right of the states to *impose* these prohibitions and not the right to *enforce* them by suspension of a state permit to operate. (Resp. Br. p. 22-23). It is submitted that there is no substance to this distinction. Implicit in any judicial finding that a statutory prohibition is valid, are two basic assumptions: (1) That the statutory mandate will be obeyed voluntarily by the law-abiding majority; (2) That the uncooperative minority may be compelled to conform by whatever reasonable[6] enforcement measures are deemed necessary.

In any event, this court has specifically decided that a state may suspend the privilege of a motor carrier to operate over the highways within such state in inter-state commerce, as a penalty for violations of valid state regulations, covering matters in which Congress has not occupied the field. In *Welch Co. v. State of New Hampshire* (1939), 306

[6] As pointed out above, the reasonableness of the sanction employed in the case at bar is not here at issue. But even if it were, the complete answer to Respondent's arguments that less stringent measures would have sufficed may be found in the following excerpts from the opinion in the *Barnwell* case, 303 U. S. 177, pp. 190-191: "Where Congress has not acted, a court is not called upon, as are the state Legislatures, to determine what, in its judgment, is the most suitable restriction to be applied of those that are possible, or to choose that one which in its opinion is best adapted to all the diverse interests affected. (Citation) When the action of a Legislature is within the scope of its power, fairly debatable questions as to its reasonableness, wisdom and propriety, are not for the determination of the courts, but for the legislative body."

U. S. 79, as a penalty for violations of a New Hampshire statute, limiting the number of hours of continuous driving, permissible for a driver of a motor carrier using the highways of that state, the state suspended for five days the state certificate of the H. P. Welch Co. and this was held to be a valid exercise of the state police power, not in conflict with the federal Motor Carrier Act, 1935.

The Illinois Supreme Court, in its opinion below in the case at bar, mistakenly assumed that the *Welch* case predated the Motor Carrier Act and sought to distinguish it on that ground. Thus the Illinois court stated that the court in the *Welch* case

> "strongly suggested that the power of the state would be superseded when the Federal Motor Vehicle Act * * * became effective", *Hayes Freight Lines v. Castle*, 2 Ill. 2d 58, 117 N. E. 2d 106, p. 113.

This was an entirely erroneous assumption. Not only was *Welch Co. v. State of New Hampshire* (1939), 306 U. S. 79 decided *after* the Motor Carrier Act, 1935, but the court expressly decided that the federal Act did *not* supersede the state power to impose the sanction in question.

To be sure, at the time of the *Welch* decision, the Interstate Commerce Commission, in pursuance of an explicit authorization under the Motor Carrier Act so to do, had promulgated certain federal maximum hours of continuous-driving regulations. But these I.C.C. regulations were not yet effective on the date of the *Welch* decision and the court therefore held that the state power to enforce its own regulations had not yet been superseded. If the sanction imposed by the state of New Hampshire in *Welch Co. v. New Hampshire* (1939), 306 U. S. 79 was upheld, in the face of existing, though not yet effective, conflicting federal

regulations, *a fortiori* the sanction imposed by the state of Illinois in the case at bar should be upheld, for in the case at bar the I.C.C. has not only failed to exercise the power, but does not even possess the power, to regulate weights and sizes of trucks using state highways.

Respondent seeks to discredit *Welch Co. v. New Hampshire*, (1939), 306 U. S. 79, as authority for the right of a state to suspend the operations of an inter-state motor carrier, on the ground that "it involved no attempt by the state to suspend the right to operate solely in inter-state commerce." (Resp. Br. p. 18). Let Respondent's point be conceded. The Welch Co. was not engaged *solely* in inter-state commerce. But the facts show that 99 per cent of its business was inter-state, so that for all intents and purposes it may as well have been engaged *exclusively* in inter-state commerce. Moreover, the Supreme Court disregarded the 1 per cent of Welch's business which was not inter-state commerce, stating the issue thus (306 U. S. p. 84):

> "The sole question is whether Congress intended that from the time of the federal enactment until effective action by the Commission, there should be no regulation of periods of continuous operation by drivers of motor vehicles hauling in *interstate* commerce." (Emphasis supplied)

Not only with respect to weights and sizes and maximum hours of driving, but also in other fields, the courts have had no difficulty in upholding state sanctions, even where the operative effect is a prohibition of the privilege of using state highways in inter-state commerce. Thus in *Ziffrin Inc. v. Reeves* (1939), 308 U. S. 132, despite the fact that the trucker in question had obtained an I.C.C. Certificate under the federal Motor Carrier Act, the Supreme Court

upheld the right of the state of Kentucky to refuse Ziffrin a state permit to haul liquor from Kentucky to Illinois. Again, in *Buck v. California* (1952), 343 U. S. 99, the Motor Carrier Act of 1935, was held to be no obstacle to denial by the County of San Diego, California, of a permit to use the county highways for the carrying on of a taxi-cab business in foreign commerce between California and Mexico. Although the *Buck* case was a five to four decision, even the dissenters conceded that they would have agreed with the majority view, had the enforcement of weight limitations been in issue. Said Justice Reed, who wrote the dissenting opinion (343 U. S. p. 108):

> "We assume that San Diego County might require that loads should not exceed a reasonable minimum weight and that, *if appellants violated such regulation, the county could properly prohibit them from driving their taxicabs across the County.*" (Emphasis supplied.)

In each of these decisions, the Courts had only to find that the subject matter of the state regulation had not been dealt with by Congress or by the Interstate Commerce Commission, under the federal Motor Carrier Act, 1935 (now Part II of the Interstate Commerce Act). Having so found, the courts uniformly upheld the right of the state in question to enforce its regulations, whether by denying in the first instance, or by subsequently suspending, the privilege of the carrier to use the highways of the state, in inter-state commerce or otherwise.

The significant fact is that, in face of this uniform line of decisions, Respondent offers not a single authority to the contrary, except for the decision of the Illinois court below.

It is submitted, therefore, that the decision of the Illinois court must be reversed and the validity of the Illinois statute, here in issue, upheld in all respects.

Respectfully Submitted,

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